

UNITED STATES. CIRCUIT COURT OF APPEALS FOR
THE SECOND DISTRICT.

National Phonograph Co.,	)	Writ of error to
Plaintiff in error	)	review the decree
versus	)	of the Circuit
New York Phonograph Co.,	)	Court adjudging
Defendant in error	)	defendant guilty of
		contempt.

COMPENDIUM OF IMPORTANT PAPERS SUBMITTED BY
PLAINTIFF IN ERROR
1908

IN THE
United States Circuit Court of Appeals
FOR THE SECOND CIRCUIT.

NATIONAL PHONOGRAPH COMPANY,
Plaintiff in Error,

vs.

NEW YORK PHONOGRAPH COMPANY,
Defendant in Error.

Writ of Error to Review
the Decree of the
Circuit Court Adjudg-
ing Defendant Guilty
of Contempt.

**COMPENDIUM OF IMPORTANT PAPERS SUBMITTED
BY PLAINTIFF IN ERROR.**

ROBINSON, BIDDLE & BENEDICT,
Solicitors for Plaintiffs in Error.

WILLIAM J. WALLACE,
CHARLES L. BUCKINGHAM,
Of Counsel.

C. G. BURGOYNE, 72 to 73 Spring Street, New York.

INDEX.

	Transcript Page of Record. herein.
Judge Hazel's original decree of May 2, 1905, in the lower Court.....	Vol. 1, p. 21 1
The Injunction.....	Vol. 1, p. 25 5
Original Metropolitan License, Oct. 12, 1888.....	Vol. 1, p. 385 8
Extended Metropolitan License, June 23, 1890	Vol. 1, p. 417 24
Judge Hazel's Opinion in Attach- ment proceedings.....	Vol. 2, p. 1213 31
Judge Hazel's Opinion on Re- argument	Vol. 2, p. 1301 41
Order Adjudging Defendant in Contempt.....	Vol. 2, p. 1307 47
Opinion of the Appellate Di- vision, in New York Phono- graph Co. v. Davega, 111 N. Y. Supp. 363.....	----- 52
Aylsworth & Miller Patent, No. 683,676, Oct. 1, 1901.....	Vol. 2, p. 1025 67
Edison Patent No. 713,209, Nov. 11, 1902.....	Vol. 2, p. 1052 75

Decree.

57

Exhibit "A."

In the Circuit Court of the United States
for the Southern District of New
York, held in the court-room in the
Post Office Building in the County
of New York, on the 2nd day of May,
1905.

58

Present—HON. JOHN R. HAZEL, U. S. Judge.

NEW YORK PHONOGRAPH COMPANY,
Complainant,

AGAINST

THOMAS A. EDISON, EDISON PHONO-
GRAPH COMPANY, EDISON PHONO-
GRAPH WORKS, and the NATIONAL
PHONOGRAPH COMPANY,
Defendants.

Decree.

59

This cause came on to be heard upon the bill, an-
swer, replication and evidence, and was argued on May
31 and June 1, 2 and 3, 1904, by Louis Hicks and John
C. Tomlinson, Esqs., counsel on behalf of complain- 60
ant, and by C. L. Buckingham and C. M. Hough, Esqs.,
counsel on behalf of defendant, National Phonograph
Company, and was further heard and argued by said
counsel on February 27, 1905, and thereupon upon
consideration thereof, it was and hereby is ordered,
adjudged and decreed as follows:

FIRST.—That the defendant, National Phonograph
Company, has trespassed and infringed upon and
wrongfully invaded the rights of complainant, New
York Phonograph Company, by selling and by using,

Decree.

- 61 and by causing to be sold and by causing to be used by others than complainant, within the State of New York, phonographs and supplies therefor, and by selling for use, and by licensing for use, by others than complainant, within the State of New York, phonographs and supplies therefor in violation of the provisions of and of the rights of the complainant under certain contracts as extended bearing date October 12, 1888, between the North American Phonograph Company and the Metropolitan Phonograph Company and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott, and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company.
- 62
- 63 SECOND.—That complainant, New York Phonograph Company, recover from defendant, National Phonograph Company, the profits, gains and advantages, which the said defendant has received or made, or which have arisen or accrued to it by reason of its said trespass, infringement and wrongful invasion, together with the damages which the complainant has sustained by reason thereof. And since it does not appear to the Court what such profits and damages are, it is further ordered, adjudged and decreed, for
- 64 special reasons shown, to wit: the concurrence of the parties to the appointment and the long experience in such matters of the appointee, that this cause be referred to John A. Shields, Esq., a standing examiner of this Court to take, state and report to the Court, an account of the said profits which the said defendant has made or received or which have arisen or accrued to it, by reason of said trespass, infringement and wrongful invasion of complainant's rights, and also to assess the damages which the complainant has sustained by reason thereof, as above stated.

Decree.

THIRD.—That the complainant on such accounting have the right to cause the said defendant, National Phonograph Company, by its officers, agents, clerks and employees to be examined *ore tenus* or otherwise, upon oath, touching all matters contained in said reference; and also to require the production of all books, papers, writings, vouchers and other documents applicable thereto, and in the possession of said defendant or under the control of said defendant or its officers; and the said defendant by its officers, agents, clerks and employees shall attend for such purpose before the said master, John A. Shields, Esq., at such times and place as he, the said master, shall or may require.

FOURTH.—That complainant, New York Phonograph Company recover from defendant, National Phonograph Company, the costs herein to be taxed by the Clerk of this Court.

FIFTH.—It is further ordered, adjudged and decreed that a writ of injunction issue out of and under the seal of this Court, as prayed for in the bill of complaint herein, directed to said defendant, National Phonograph Company, and enjoining and restraining said defendant, National Phonograph Company, its officers, agents, clerks, servants, employees, attorneys, successors, assigns, associates, dealers, confederates and all persons in privity with said defendant, National Phonograph Company, from directly or indirectly, selling or leasing within the State of New York, phonographs and supplies therefor, to others than complainant and from using within the State of New York, phonographs and supplies therefor, and from causing to be sold or causing to be leased or causing to be used, within the State of New York, phonographs and supplies therefor, by others than complainant, and from selling for use or licensing for use within the State of New York, phonographs and supplies therefor, by others than complainant, in violation of the provisions of and of the rights of the complainant under certain contracts as extended, bear-

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68

Decree.

69

ing date October 12, 1888, between The North American Phonograph Company and the Metropolitan Phonograph Company, and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott, and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company.

70

(Sgd.) ,

JOHN R. HAZEL,
United States Judge.

A Copy.

JOHN A. SHIELDS

Clerk.

[SEAL.]

71

72

Injunction.

73

Exhibit "B".

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

NEW YORK PHONOGRAPH COMPANY,
Complainant,

vs.

NATIONAL PHONOGRAPH COMPANY im-
pleaded with THOMAS A. EDISON,
EDISON PHONOGRAPH COMPANY and
the EDISON PHONOGRAPH WORKS,
Defendant.

In Equity.
Injunction.

74

75

THE PRESIDENT OF THE UNITED STATES:—

To National Phonograph Company, its officers,
agents, clerks, servants, employees, attorneys, suc-
cessors, assigns, associates, dealers, confederates and
all persons in privity with said National Phonograph
Company; Greeting

WHEREAS it has been represented to us in our Cir-
cuit Court of the United States for the Southern Dis-
trict of New York, that National Phonograph Company
has trespassed and infringed upon and wrongfully in-
vaded the rights of the complainant, New York Phon-
ograph Company, by selling and by using, and by
causing to be sold and by causing to be used by others
than complainant, within the State of New York, phon-
ographs and supplies therefor, and by selling for use
and by licensing for use by others than complainant,
within the State of New York, phonographs and sup-
plies therefor in violation of the provisions of and of
the rights of the complainant under certain contracts
as extended bearing date October 12, 1888, between

76

Injunction.

77

the North American Phonograph Company and the Metropolitan Phonograph Company and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott; and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company.

78

AND, WHEREAS, by a certain decree entered herein May 2, 1905, in the office of the clerk of the Circuit Court of the United States for the Southern District of New York, it was, among other things, ordered, and decreed that an injunction do issue against you, the said parties above mentioned, restraining you, the said parties, in the manner as hereinafter mentioned; and, whereas said decree entered herein May 2, 1905, has been affirmed on appeal by the United States Circuit Court of Appeals for the second Circuit, as appears by the mandate of said court filed March 23, 1906, in the office of the clerk of the Circuit Court of the United States for the Southern District of New York;

79

Now, therefore, we do strictly command, enjoin and restrain you, the National Phonograph Company, and you, its officers, agents, clerks, servants, employees, attorneys, successors, assigns, associates, dealers, confederates and all persons in privity with the National Phonograph Company, and each and every of you under the penalty that may fall thereon, perpetually from directly or indirectly, selling or leasing within the State of New York, phonographs and supplies therefor, to others than complainant and from using within the State of New York, phonographs and supplies therefor and from causing to be sold or causing to be leased or causing to be used, within the State of New York, phonographs and supplies therefor, by others than complainant, and from selling for use or licensing for use, within the State of New York, phonographs and supplies therefor, by others than complainant in violation of the provisions of and of the rights

80

Injunction.

81

of the complainant under certain contracts as extended, bearing date October 12, 1888, between the North American Phonograph Company and the Metropolitan Phonograph Company and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott, and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company.

82

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the United States, at the City, County and Southern District of New York, this 26th day of March, 1906, A. D.

JOHN A. SHIELDS,
Clerk.

(Seal of the Circuit Court of the United States for the Southern District of New York.)

83

[ENDORSED:] U. S. Circuit Court, Southern District of New York. New York Phonograph Company, Complainant, against National Phonograph Co. impleaded with Thomas A. Edison, Edison Phonograph Works and Edison Phonograph Company, Defendant. Injunction. Louis Hicks, Counsel for Complainant, 25 Pine Street, New York, N. Y. I hereby certify that on the 27th day of March, 1906, at the City of New York, in my District I served the within Injunction upon the within named Defendant National Phonograph Company, by exhibiting to Wm E. Gillmore, as Pres. of said Co. at No. 31 Union Square, N. Y. City, the within original, and at the same time leaving with him a copy thereof. Wm. Henkel, United States Marshal, Southern District of New York. Dated Mar. 27, 1906. U. S. Circuit Court, Southern District of New York, Filed Mar. 27, 1906, John A. Shields, Clerk.

84

A Copy.

JOHN A. SHIELDS,
Clerk.

(SEAL)

81 **"Defendant's Exhibit Original Metropolitan License" (Referred to in Affidavit of Thomas A. Edison).**

This Agreement, made this 12th day of October, A. D. 1888, by and between the NORTH AMERICAN PHONOGRAPH COMPANY, a corporation duly organized under the laws of the State of New Jersey, owning or controlling certain patents of the United States of America and the Canadas, for inventions of Thomas A. Edison appertaining to what is known as the Phonograph

82 and Speaking Phonograph, and acting under authority of and agreement with Jesse H. Lippincott, sole licensee of the American Graphophone Company, a corporation duly organized under the laws of the State of West Virginia, controlling certain patents of the United States of America for inventions of Alexander Graham Bell, Chichester A. Bell and Charles Sumner Tainter, appertaining to what is known as the Graphophone, lessor and licensor, party of the first part, and the METROPOLITAN PHONOGRAPH COMPANY, a corporation duly organized under the laws of the State of New York, lessee and licensee, party of the second part, witnesseth :

83 WHEREAS, the lessor and licensor, party of the first part, owns or controls, or has the right to use, the Letters Patent of the United States granted to Thomas Alvah Edison and numbered as follows : 200,521, 201,760, 213,554, 227,679, 382,414, 382,416, 382,417, 382,418, 382,419, 382,462, 386,974, respectively, and the inventions covered thereby, and owns or controls

84 or has the exclusive right to use in the United States and Canadas, and may hereafter own or control or have the exclusive right to use in the United States and Canadas other inventions of Thomas Alvah Edison, which are or may be embodied in or applicable to Phonographs or Phonographic appliances ; and

Whereas, the lessor and licensor, party of the first part, acting under authority of and agreement with Jesse H. Lippincott, sole licensee of the American

Graphophone Company, has the exclusive right to use 85
or let or sell to others to use in the United States the
inventions covered by the Letters Patent of the United
States granted to Alexander Graham Bell, Chichester
A. Bell and Sumner Tainter, numbered 341,212 ;
341,213 and the Letters Patent of the United States
granted to Chichester A. Bell and Sumner Tainter
numbered 341,214 and the Letters Patent of the United
States granted to Sumner Tainter numbered 341,287 ;
341,288 and the Letters Patent of the United States 86
granted to Charles Sumner Tainter numbered 374,133 ;
375,579 ; 380,535, respectively, and owns or has a right
to use and may hereafter own or have the right to use
other inventions which are or may be embodied in or
applicable to the Graphophone and Graphophonic ap-
pliances, which is to be hereafter known and described
and designated as the Phonograph-Graphophone, and
desires to extend the use of Phonographs and Phono-
graph-Graphophones leased and licensed by it, and of
appliances therefor under and pursuant to the grant of
the exclusive rights to the party of the second part 87
herein contained ; and

Whereas, the lessee and licensee, party of the second
part desires to obtain such exclusive rights to the use
of Phonographs and Phonograph-Graphophones, and
for the use of appliances therefor, under lease and li-
cense from the lessor and licensor, party of the first
part, and to use and sublet the said instruments and
to use, sell and dispose of appliances therefor within
the territory hereinafter described under and pursuant
to the terms, restrictions and provisions hereinafter set 88
forth.

NOW, THEREFORE, for and in consideration of the sum
of One hundred thousand dollars, to be paid to the
party of the first part by the party of the second part,
receipt of which is hereby acknowledged, and for other
good and valuable considerations, and in consideration
of the covenants and agreements herein contained and
the rental herein agreed to be paid, it is agreed by and
between the parties hereto, as follows :

FIRST. The rights hereby granted shall remain in

- 89 force and this agreement shall continue until the 12th day of October, A. D. 1893, and for such further period as hereinafter provided, unless sooner terminated as hereinafter provided, and shall extend and exist and be exercised and the instruments and property leased hereunder shall be used only within the following described territory, namely, the Counties of New York, Westchester, Richmond, Queens, Suffolk and Kings in the State of New York, U. S. A. And the party of the first party hereby covenants and agrees that it will
- 90 grant no other similar rights or any rights for the use of the Phonograph or Phonograph-Graphophone or Phonographic or Phonograph-Graphophonic appliances for the foregoing territory or any part thereof while this agreement shall remain in force.

- SECOND. The instrument which has heretofore been known or designated as the "Graphophone" shall at all times and in all dealings, advertisements, agreements and business of the party of the second part be known, designated and described as the "Phonograph-Graphophone" and the instruments heretofore known or designated as the "Phonograph" shall continue to be so known, designated and described. In dealing with the public and sub-lessees the party of the second part shall and will at all times offer and show both instruments together with absolute impartiality, leaving the person or persons with whom it is dealing to make his or their own selection, and the party of the second part, its officers, agents and employees shall in no way press the introduction of one instrument at the expense of the other, and the commission or remuneration to agents, if any shall be employed, shall be the same on each instrument.
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THIRD. The party of the second part admits the validity of all patents relating to Phonographs, Phonograph-Graphophones and appliances therefor now held or which may hereafter be held by the party of the first part, or under which it may hold licenses exclusive in their character, or under which its business may be conducted, and the validity of its rights under or title thereto, and will not dispute the same or make

use of, or be interested in or cause others to make use 93
of, or be interested in any Phonographs or Phono-
graph-Graphophones or appliances therefor, or any
instrument of a similar kind not leased, licensed, or
authorized by the party of the first part, or its assigns.
Provided, however, that the party of the second part
may manufacture or be interested in the manufacture
and sale of such Phonographic or Phonograph-Grapho-
graphic appliances as may be approved of in writing by
the party of the first part, provided, however, that no 94
such authority shall be construed to apply to the
manufacture of any articles the right to manufacture
which is now or may hereafter be vested in
the American Graphophone Company or in the Edi-
son Phonograph Company of New Jersey, or of
the Edison Phonograph Works, pursuant to the sev-
eral agreements now existing between the above-
mentioned parties or either of them and the North
American Phonograph Company and Jesse H. Lippin-
cott, sole licensee of the American Graphophone Com-
pany, or either of them. 95

FOURTH. The party of the first part at the places
where Phonographs or Phonograph-Graphophones are
manufactured or from its depot of supplies situate
nearest to the general office of the party of the second
part, will deliver to the party of the second part, Phono-
graphs and Phonograph-Graphophones and supplies
therefor, made and to be used under the patents and
rights herein described during the continuance of this
agreement, and as herein set forth and permitted, and 96
all Phonographs and Phonograph-Graphophones and
supplies therefor delivered to the party of the second
part during the continuance of this agreement shall be
deemed to be furnished thereunder. Each of the said
Phonographs and Phonograph-Graphophones so de-
livered shall remain the property of the party of the
first part, and is and shall be hereby leased and the
use of it licensed by the party of the first part under
said patents and authority aforesaid now acquired or
which may hereafter be acquired from the date of such
delivery, upon condition and so long as the rental

97 therefor shall be duly paid to the party of the first part as herein provided, and so long as the provisions hereof are not violated, but not longer or otherwise and subject to the terms of this agreement, the party of the second part may sublet or make sale of said instruments as hereinafter provided.

98 FIFTH. The party of the second part shall pay and hereby agrees to pay to the party of the first part a rental at the rate of \$20 per year on and for each and every Phonograph, and on and for each and every Phonograph-Graphophone delivered to it, payable in equal quarterly payments in advance, said rental to commence for each Phonograph or Phonograph-Graphophone on the first day of the first calendar month after its shipment by the party of the first part, and shall cease when and continue until the instrument so leased shall be returned into the possession of the party of the first part, and a notice by the party of the second part to the party of the first part of ten days in writing to its general office in the City of New York of its intention to deliver the said Phonograph or Phonograph-Graphophone, shall be considered as a return and delivery of same into the possession of the party of the first part. And said rental shall cease also whenever proof shall be given satisfactory to the party of the first part of the destruction of the same by fire or other accident beyond the control of the party of the second part.

99 SIXTH. The party of the second part may sublet the Phonograph and Phonograph-Graphophones leased to it by the party of the first part under this agreement, but such subletting shall be subject to the restrictions and provisions of this agreement applicable thereto, and shall be under a sublease or an agreement in writing, the form of which shall be approved by the party of the first part, and each and every such sublease or agreement shall expressly set forth that the Phonograph or Phonograph-Graphophone so sublet is the property of the party of the first part, and that the same is leased and licensed under the provisions of this agreement and not otherwise.

100 And no such

sublease shall be made for any period less than three 101
months. For each instrument sublet the party of the
second part shall charge the sub-lessee rental at the
rate of forty dollars per annum (neither more nor less),
payable in equal quarterly payments in advance.

SEVENTH. The party of the second part shall keep 102
all instruments leased to it under this agreement in
good working condition, and to that end shall keep in
its employ a sufficient number of persons living at dif-
ferent points in its territory, who, while acting as
agents or solicitors for the party of the second part,
shall have sufficient knowledge of the instruments to
enable them to remedy any slight defect in the work-
ing thereof. But whenever any part of an instrument
shall wear out from the ordinary wear and tear by
actual and legitimate use, it shall, upon its return to
the party of the first part, be replaced by a new part
free of charge by the party of the first part. When
any part shall be broken or rendered ineffective by the
carelessness or neglect of the party of the second part
or its sub-lessee, the same shall be replaced at the 103
expense of the party of the second part or of its sub-
lessee.

EIGHTH. The party of the first part will, during the
continuance of this agreement and the leases there-
under, furnish to the party of the second part, after
requisition by it, all such extra cylinders for use on
instruments leased and "special extras," such as
records of music, orations, novels or other appliances
and parts of instruments applicable thereto, which 104
shall be sold by the party of the second part at prices
which shall be fixed from time to time by the party of
the first part. Such prices shall be uniform in the
case of each sub-company acting under the authority
of the North American Phonograph Company, or of
Jesse H. Lippincott, sole licensee of the American
Graphophone Company, and the party of the second
part shall and it hereby agrees to pay the party of
the first part for all extra cylinders, "Special Extras,"
parts and appliances so furnished, prices which shall
be fixed at twenty per cent. less than the prices

105 at which the same shall be sold by the party of the second part to others, payments to be made by the party of the second part to the party of the first part, on the 10th day of each month for all such cylinders, "Special Extras," parts and appliances delivered during the previous month.

NINTH. The party of the second part shall give immediate information and notice to the party of the first part whenever said party of the second part shall know that any one in its territory is using an instrument or any appliances thereof or therefor which shall be an infringement of the patents or rights owned or controlled by the party of the first part, and upon receipt of such information the party of the first part will, at its own expense, at once institute legal proceedings or cause them to be instituted for the protection of the patents or rights owned or controlled by it.

And the party of the first part agrees at its own expense to defend the party of the second part against all suit for infringements by reason of the possession, leasing, use or sale of said instruments, supplies or appliances and to pay all final judgments rendered in such suits, provided the party of the first part shall have notice of such suit and opportunity to defend the same, such notice to be given in time to allow the party of the first part to make answer, plea or other appropriate defense to the original bill, petition, complaint or other original pleading and to defend through any counsel of its own selection. And the party of the second part shall not be at liberty to defend any such suit or legal proceeding on its own behalf until the party of the first part shall have refused to do so upon demand.

And the party of the first part further agrees that it will protect, indemnify and save harmless the party of the second part, by reason of any damages or expenses which it may suffer, incur or sustain, growing out of any proceedings at law or in equity, or any litigation which may be brought against, or which may injuriously affect the party of the second part in the quiet title to or possession or enjoy-

ment of the rights and interest hereby granted or intended to be granted, provided the party of the first part shall have opportunity to defend as aforesaid any suit or proceeding brought against the party of the second part. 109

TENTH. If on the first day of January, 1890, or at any time thereafter there shall be in any portion of the territory covered by this agreement a demand for Phonographs or Phonograph-Graphophones, Special Extras or appliances which the party of the second part shall neglect or fail to take appropriate measures to meet, the party of the first part may give written notice thereof to the party of the second part, and if at the end of thirty days thereafter the said neglect or omission still continues, the party of the first part may, so long as such default shall continue, but to the extent only of such default, proceed to supply the demand through agents or otherwise, without liability to the party of the second part, provided that course shall not interfere with the delivery to the party of the second part of instruments, special extras or appliances for which requisition shall be made by it under the terms of this agreement. 110 111

But it is expressly understood and agreed that if at any time after one year from the date of this agreement the North American Phonograph Company shall be unable or shall fail to deliver to the party of the second part instruments and supplies for which said party of the second part shall have made due requisition upon the party of the first part as such requisition is provided to be made in the case of the Phonograph-Graphophone by Jesse H. Lippincott upon the American Graphophone Company pursuant to the agreement between said Lippincott and said American Graphophone Company under agreement dated March 26th, 1888, and in case of the Phonograph as provided it shall be made by the Edison Phonograph Company upon said Thomas A. Edison or the Edison Phonograph Works pursuant to the agreement of October 28, 1887, or by the North American Phonograph Company upon said 112

- 113 Thomas A. Edison or the Edison Phonograph Works pursuant to the agreement of August 1st, 1888, and subject in the case of the Phonographs and Phonograph-Graphophones to the several terms of said agreements affecting such neglect or failure to supply either of said instruments, then the party of the second part shall have the right which the said North American Phonograph Company, or Jesse H. Lippincott, sole licensee of the American Graphophone Company, would then have to manufacture or cause to be manufactured instruments or supplies or both necessary to fill so much of such requisition as the said North American Phonograph Company, or Jesse H. Lippincott, sole licensee of the American Graphophone Company, shall be unable or shall fail to supply, and all costs of said instruments or supplies to the party of the second part over and above the cost thereof as determined by the rentals of Phonographs or Phonograph-Graphophones or the prices of special extras and appliances as herein provided to the party of the second part, shall be borne by the party of the first part.
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- ELEVENTH. If on the first day of January, 1890, or at any time thereafter, the results of exclusively leasing instruments shall be unsatisfactory to the party of the first part, it may require the party of the second part to give the public the option of either leasing or purchasing the instruments, and in such event sales shall be made at such reasonable prices which shall be fixed by the party of the first part, provided,
- 116 however, that if such requirement shall be made in the case of any one sub-company, it shall be operative in the case of all sub-companies acting under the authority of the North American Phonograph Company, or of Jesse H. Lippincott, sole licensee of the American Graphophone Company. From the price received from any instrument so sold there shall be first deducted and paid to the party of the first part an amount which shall equal the actual cost of said instrument to the party of the first part, and the remainder of such selling price shall be equally divided

between the party of the first part and the party of the second part, settlements and payments to be made by the party of the second part on or before the tenth day of each month for all sales made during the previous month. 117

TWELFTH. In the conduct of its business and in all circulars, card and advertisements, there shall appear and the party of the second part shall set forth, as prominently as its own corporate name and in connection therewith whenever it shall occur, the following "Metropolitan Phonograph Company, acting under authority of the North American Phonograph Company, and Jesse H. Lippincott, sole licensee of the American Graphophone Company." 118

THIRTEENTH. The party of the first part having made liberal provisions for conducting experiments, looking towards the improvement and perfection of the Phonograph and Phonograph-Graphophone by the respective inventors thereof during the next fifteen years or thereabouts, will be entitled to the ownership, use or control of whatever inventions are made and patented by such inventors, and the instruments leased or to be leased under this agreement shall have the benefit of all improvements and inventions thus secured ; and any other improvements and inventions which the party of the first part may become entitled to the use, ownership or control thereof during the term of this agreement or any extension or renewal thereof ; but it is expressly understood that no new patented invention of the said Edison shall be used or sold with the Phonograph-Graphophone, and no new patented invention owned or controlled now or hereafter by the Volta Graphophone Company shall be used upon or sold with the Phonograph. 119 120

The instruments delivered by the party of the first part under this agreement shall at all times possess all the improvements thereon which at the time of such delivery or prior thereto have been adopted by the party of the first part. And it is further provided that if the furnishing of such new improvements or inventions shall add materially to the cost of the Phono-

121 graph or Phonograph-Graphophone, as the same is now known, the question of such additional charge, if any, shall be left to an arbitration, the party of the first part choosing one arbitrator and the party of the second part another, and the two, if they fail to agree, a third to be chosen by the two arbitrators, and the decision of such arbitration or of a majority thereof thus made shall be binding upon the parties hereto.

122 FOURTEENTH. If the party of the second part shall fail to pay the party of the first part any sum or sums of money which may be due under this agreement, and if said default shall continue for the period of thirty days after the same shall have become payable, and after written demand therefor, or if the party of the second part shall violate any other of the terms or conditions of this agreement, and shall persist in such default, violation or neglect, or fail to remedy or repair the same for sixty days after written notice thereof from the party of the first part, or if the party of the second part shall become bankrupt or insolvent and shall so continue for the period of thirty days, then the party of the first may, if it shall so elect, by written notice to the party of the second part (or those in charge of any of its offices), immediately terminate all the rights granted by the party of the first part hereunder and take possession of and remove all Phonographs and Phonograph-Graphophones and supplies therefor, and for that purpose may enter the premises of the party of the second part and of all persons claiming under it, and may collect from any sub-lessee or purchaser all sums then or thereafter due to it, or to the party of the second part, for the use or purchase of any instruments, or for supplies therefor, or it may, so long as it shall see fit, leave in the enjoyment and use of any Phonograph or Phonograph-Graphophone any lessee or other person in actual possession thereof, or by or from whom any part of the purchase price is unpaid, and collect from him or them in such sums as may then and thereafter be or become due for the use or purchase of the Phonograph or Phonograph-Graph-

123

124

ophone, and for that purpose shall be entitled to and 125
may take possession of the premises of the party of
the second part used for carrying on its business and
occupy and conduct the same. The property so
taken and which does not belong to the party of the
first part or revert to it hereunder may be returned
within six months from the taking, in which case the
party of the first part shall pay to the party of the sec-
ond part a reasonable compensation for its use, or the
party of the first part may retain the same as its own 126
property, and pay therefor a reasonable price (not ex-
ceeding the actual cost thereof) within seven months
after the taking, and shall account to the party of the
second part for all the sums collected which shall have
accrued before the party of the first part became so
entitled to possession, deducting all expenses incident
thereto, and all sums which may be due to the party
of the first part. The party of the first part also
expressly reserves to itself all its rights and remedies 127
at law and in equity, under the patent laws or other-
wise, including the remedy by injunction against the
party of the second part or those claiming under it,
for the use of any of its patented inventions or instru-
ments not authorized by a subsisting license here-
under, or for the violation of any other of its rights.
The party of the first part may, in such event, at its
own cost and expense, also use the name of the party
of the second part to protect its interests and to
enforce its rights hereunder. And the said party of
the second part hereby agrees to execute any and all 128
assignments in accordance herewith, and in furtherance
of the rights of the party of the first part under this
paragraph.

FIFTEENTH. And it is further hereby expressly
covenanted and agreed by and between the parties
hereto that at the expiration of the five years herein
limited as the life of this agreement, the party of the
second part shall in such manner as may be in accord-
ance with law, increase its capital stock to the extent
of twenty-five per cent. of the par value thereof, and
shall issue and deliver the whole of such increase of

- 129 full-paid unassessable stock to the party of the first part or to Jesse H. Lippincott, Trustee, or his successor, as the party of the first part may direct, and the party of the first part shall in consideration therefor extended the agreement and the rights hereunder to March 26th, 1903, and for such further time at the option of the party of the second part as shall be equal to the time for which the party of the first part shall become authorized to grant any exclusive license under any
- 130 patent or patents relating to Phonographs or Phonograph-Graphophones or improvements therefor. But it is further understood and agreed by and between the parties hereof that if before the expiration of said five years from the 12th day of October, 1888, the said Metropolitan Phonograph Company, party of the second part, shall elect to increase its capital stock pursuant to the terms of this agreement and shall deposit the said \$250,000 (2,500 shares) of capital stock with the Central Trust Company of the City of New
- 131 York for delivery to the said North American Phonograph Company, party of the first part, or to Jesse H. Lippincott, Trustee, or his successor, as the party of the first part may direct, at the expiration of said five years, that then and in that event and upon due notice to the said North American Phonograph Company, party of the first part, of the increase of said capital stock and the deposit of said shares with said Trust Company as aforesaid the North American Phonograph Company, party of the first part shall forthwith
- 132 deliver to the said Trust Company a license to the party of the second part similar in form to the license herein granted, for a further period from the expiration of said five years, namely, until the 26th day of March, 1903, and for such further time at the option of the party of the second part as it may be authorized to extend said license as aforesaid ; the deposit of said shares of capital stock and said extended license to be upon the following conditions : That at the expiration of said five years the said Trust Company shall deliver to the North American Phonograph Company,

party of the first part, or to the said Jesse H. Lippincott, trustee, or his successor, as the party of the first part may direct, said 2,500 shares of stock of the Metropolitan Phonograph Company, party of the second part, and said Trust Company, shall deliver to the Metropolitan Phonograph Company, party of the second part, its successors or assigns, the said extended license, or the said company shall be immediately entitled to the possession of the said extended license on the delivery aforesaid of said 2,500 shares of stock. In the event of such present delivery of such shares of stock to the North American Phonograph Company, party of the second part, or to Jesse H. Lippincott, Trustee, or his successor, as the party of the first part may direct, said party of the first part and said trustees shall agree with the party of the second part that neither it nor he will dispose of the said shares of stock during the said five years, or of any interest therein, and that all dividends which may be earned and declared upon said 2,500 shares of stock during the said five years shall be repaid to the party of the second part.

SIXTEENTH. This contract is personal to the party of the second part herein named, and any assignment of it, or of any of its rights granted hereunder, or any or either of them, by act of the party of the second part without the written consent of the party of the first part, shall be a violation of this agreement, and good and sufficient ground for a cancellation thereof by the party of the first part at its option.

SEVENTEENTH. If the party of the first part shall transfer to any party, parties or corporations who shall agree to perform the stipulations hereof its title to the Phonographs and Phonograph-Graphophones hereby leased and the patent rights under which they are licensed, and its then existing interests hereunder, it is agreed that the provisions hereof shall enure to the benefit of and shall be binding upon such transferee in respect of all things done under this agreement, as if the transferee were named a party hereto, but the party of the first part, said

137 The North American Phonograph Company, shall not be released from its obligations hereunder, but shall continue to be answerable hereunder to the party of the second part pursuant to the terms of this agreement, as if such transfer had not been made.

138 EIGHTEENTH. The party of the first part hereby covenants for itself and its assigns, with the party of the second part, that is, the party of the first first, is at the date hereof fully and lawfully entitled and empowered to make and perform this agreement and license and every part thereof, and that it will on demand from time to time execute and deliver to the party of the second part all such further or other instruments of assurance as the party of the second part shall reasonably require.

139 NINETEENTH. The party of the second part hereby further agrees that it will keep its books of account, sales book, records of rentals and other office records in such form and will make such reports to the party of the first part as may be prescribed and directed by the party of the first part through its auditor appointed for the purpose of organizing and maintaining a general form of records and accounts for all sub-companies.

140 TWENTIETH. It is hereby understood and agreed that the use of the Phonograph and Phonograph-Graphophone, so far as the same or either of them is applicable to watches, clocks, or in so far as the use thereof has been conveyed by the said Edison to Lowell C. Briggs and William W. Jacques under and pursuant to a certain agreement bearing date the first day of October, 1887, is hereby accepted and reserved from this the terms of this agreement, and that this agreement shall not be construed as in any way authorizing the party of the second part to use the inventions covered hereby for such purposes. But it is further understood and agreed that 50 per cent. of the profits which may be received by the party of the first part or by Jesse H. Lippincott, sole licensee of the American Graphophone Company, shall be divided, in such equitable way as may hereafter be

determined, among all the sub-companies licensed by the party of the first part. 141

TWENTY-FIRST. The party of the first part further agrees that any and all privileges and powers not herein conferred upon the party of the second part which shall hereafter at any time during the continuation of this agreement be conferred by the party of the first part upon any other sub-company shall be likewise granted to the party of the second part.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed, each by the proper officers, and each has caused its corporate seal to be hereto affixed the day and year first above written. 142

THE NORTH AMERICAN PHONOGRAPH CO.,
[SEAL.] by JESSE H. LIPPINCOTT,
President.

Attest :
GEO. H. FITZWILSON,
Secretary.

METROPOLITAN PHONOGRAPH CO., 143
[SEAL.] By A. L. TAYLOR,
President.

Attest :
TIMOTHY CORNWELL,
Secretary.

144

209 **"Defendant's Exhibit Extended Metropolitan License" (Referred to in Affidavit of Thomas A. Edison).**

This agreement, made this 23rd day of June, A. D. 1890, by and between THE NORTH AMERICAN PHONOGRAPH COMPANY, a corporation duly organized under the laws of the State of New Jersey, party of the first part, and THE METROPOLITAN PHONOGRAPH COMPANY, a corporation duly organized under the Laws of the State of New York, party of the second part, witnesseth :

210 WHEREAS, heretofore and on or about the 12th day of October, A. D. 1888, the party of the first part did, by agreement dated on that day, grant to the party of the second part, as lessee and licensee, certain rights and privileges, and the party of the second part did make, to and with the party of the first part, certain agreements in respect to said rights and privileges and the business to be conducted thereunder, and all relating to the Phonograph and Phonograph-Graphophone and supplies therefor, &c., and all of which will more
211 fully appear by reference to said agreement, a copy of which is hereto annexed with the intent that the same shall be taken and considered in connection herewith ; and

WHEREAS, by said agreement, dated October 12th, 1888 (executed by the party of the first part hereto as the party of the first part therein, and executed by the party of the second part hereto as the party of the second part therein), it was among other things provided as follows :

212 " FIFTEENTH. And it is further hereby expressly
" covenanted and agreed by and between the parties
" hereto that at the expiration of the five years
" herein limited as the life of this agreement, the
" party of the second part shall in such manner
" as may be in accordance with law, increase its
" capital stock to the extent of twenty-five
" per cent. of the par value thereof, and
" shall issue and deliver the whole of such
" increase of full paid unassessable stock to the party
" of the first part or to Jesse H. Lippincott, Trustee,

" or his successor as the party of the first part may 213
" direct, and the party of the first part shall in con-
" sideration therefor extend this agreement and the
" rights thereunder to March 26, 1903, and for such
" further time at the option of the party of the second
" part as shall be equal to the time for which the
" party of the first part shall become authorized to
" grant any exclusive license under any patent or pat-
" ents relating to Phonographs, or Phonograph-
" Graphophones or improvements therefor. But it is
" further understood and agreed by and between the 214
" parties hereto that if before the expiration of said
" five years from the 12th day of October, 1888, the
" said Metropolitan Phonograph Company, party of
" the second part, shall elect to increase its capital
" stock pursuant to the terms of this agreement and
" shall deposit the said \$250,000 (2,500 shares) of
" capital stock with the Central Trust Company of the
" City of New York for delivery to the said North
" American Phonograph Company, party of the first
" part, or to Jesse H. Lippincott, Trustee, or his suc- 215
" cessor, as the party of the first part may direct, at
" the expiration of said five years, that then and in
" that event and upon due notice to the said North
" American Phonograph Company, party of the first
" part, of the increase of said capital stock, and the
" deposit of said shares with said Trust Company, as
" aforesaid, The North American Phonograph Com-
" pany, party of the first part, shall forthwith deliver
" to the said Trust Company a license to the party of
" the second part similar in form to the license herein 216
" granted, for a further period from the expiration of
" said five years, namely, until the 26th day of
" March, 1903, and for such further time at the
" option of the party of the second part as it
" may be authorized to extend such license as
" aforesaid ; the deposit of said shares of capital stock
" and said extended license to be upon the following
" conditions : That at the expiration of the said five
" years the said Trust Company shall deliver to The
" North American Phonograph Company, party of the
" first part, or to the said Jesse H. Lippincott, Trustee,

- 217 " or his successor, as the party of the first part may
" direct, said 2,500 shares of stock of the Metropolitan
" Phonograph Company, party of the second part, and
" said Trust Company shall deliver to the Metropolitan
" Company, party of the second part, its successors or
" assigns, the said extended license, or the said com-
" pany shall be immediately entitled to the possession
" of the said extended license on the delivery as afore-
" said of said 2,500 shares of stock. In the event of
" such present delivery of such shares of stock to The
218 " North American Phonograph Company, party of the
" first part, or to Jesse H. Lippincott, Trustee, or his
" successor, as the party of the first part may direct,
" said party of the first part and said trustee shall
" agree with the party of the second part that neither
" it nor he will dispose of the said shares of stock dur-
" ing the said five years, or of any interest therein,
" and that all dividends which may be earned and
" declared upon said 2,500 shares of stock during the
" said five years shall be repaid to the party of the
219 " second part ; " and

WHEREAS, the party of the second part hereto has increased its capital stock in the amount of \$250,000 (2,500 shares) and is desirous of making the deposit of the same in the manner provided for in said agreement of October 12th, 1888 ; and

- WHEREAS, the parties hereto are desirous of carrying out the provisions of said agreement of October 12th, 1888, and of depositing said shares of the capital stock of the party of the second part and the said extended
220 license, as in said agreement provided ; and

WHEREAS, the party of the first part has designated and approved the Central Trust Company of New York, as the place for said deposit, and has directed that said stock be deposited for delivery to Jesse H. Lippincott, Trustee, or his successor, at the expiration of five years from the date of said agreement ; and

WHEREAS, simultaneously with the execution of this agreement between the parties hereto and its delivery to the Central Trust Company of New York, the second part has deposited said shares of its capital stock,

as is evidenced by the receipt of said Central Trust Company of New York, endorsed at the foot of this agreement. 221

Now, THEREFORE, in consideration of said agreement of October 12th, 1888, and of the covenants and agreements therein contained and of the sum of One dollar by each to the other in hand paid, it is hereby agreed by and between the parties hereto as follows :

FIRST. It is agreed that said Twenty-five hundred shares of stock of the party of the second part herewith deposited shall forthwith be transferred to and in the name of the Central Trust Company of New York, provided that said transfer has not already been made, the same to be held by said Central Trust Company of New York upon the terms herein stated and as provided for in said agreement until the 12th day of October, 1893. 222

SECOND. It is further agreed that on the 12th day of October, 1893, said Central Trust Company of New York, shall, without further direction from the parties hereto, or either of them, and without other or further consideration, deliver and transfer to said Jesse H. Lippincott, Trustee, or his successor, said Twenty-five hundred shares of stock and shall, at the same time, deliver to the party of the first part and to the party of the second part hereto, each one copy of this agreement or extended license, which is executed and deposited, in duplicate, this day with said Central Trust Company of New York, and the party of the second part shall be immediately entitled to the possession of said extended license upon the delivery to said Jesse H. Lippincott, Trustee, or his successor, of said shares of stock. 223 224

THIRD. It is further agreed that upon delivery, as aforesaid, to said Jesse H. Lippincott, Trustee, or his successor, by said Central Trust Company of New York, of said shares of the capital stock of the party of the second part, and upon the faithful performance by the party of the second part of all the covenants and agreements made incumbent upon it by said agreement of October 12th, 1888, then that this agreement shall become and shall confer upon and shall fully and

- 225 entirely vest in the party of the second part an extension of the rights granted to and conferred upon the party of the second part by said agreement of October 12th, 1888, for a further period and until the 26th day of March, 1903, and for such further time as the party of the first part may be authorized to extend such license; subject, however, to the covenants and agreements of said agreement of October 12th, 1888, as fully and entirely as if said agreement had been in the first instance made to cover the period of the extension granted hereby, as well as the period originally thereby fixed and limited.
- 226

FOURTH. It is hereby further agreed between the parties hereto, and the said Jesse H. Lippincott, Trustee, further agrees and consents, by memorandum at the foot of this agreement, that neither the said Twenty-five hundred shares of stock, nor any interest therein, shall be disposed of prior to said 12th day of October, 1893, and that all dividends which may meanwhile be earned and declared thereon or paid thereon to the Central Trust Company of New York shall be immediately repaid and refunded by said Central Trust Company of New York to the party of the second part.

227

FIFTH. It is further understood and agreed as a condition attached to the transfer of said stock, and in which the party of the second part and each one of its stockholders has an interest, that until said 12th day of October, 1893, said Jesse H. Lippincott, Trustee, and his successor or successors, hereby waive and relinquish and shall hereafter waive and relinquish the right to any and all dividends upon said Twenty-five hundred shares of stock and that during said time said party of the second part, if it shall so elect, may declare dividends upon the remaining Ten thousand shares of stock only.

228

SIXTH. It is further agreed that until said shares of stock shall have been transferred to said Jesse H. Lippincott, Trustee, or his successor or successors, the same shall not be voted upon at any meeting of stockholders of said party of the second part.

SEVENTH. This agreement, or a proper reference

thereto, shall be entered upon the minutes of the 229
stockholders or the trustees or directors of the parties
of the first and second parts respectively.

EIGHTH. Each of the parties hereto, for itself and its
assigns, hereby further covenants and agrees to and
with the other that it will at any and all times here-
after, on demand, make, execute and deliver all such
further or other instruments of assurance, or other
papers, as shall be necessary to fully effect and carry
out the provisions of this agreement and of said agree-
ment of October 12th, 1888. 230

IN WITNESS WHEREOF, the parties hereto have caused
this instrument to be executed by their proper
officers respectively, and their respective corporate
seals to be hereto affixed the day and year first above
written.

THE NORTH AMERICAN PHONOGRAPH CO.,

By JESSE H. LIPPINCOTT,
Prest.

[SEAL.] { The North American
Phonograph Co.
Incorporated under
the laws of New
Jersey. 1888. }

231

Attest :

GEO. H. FITZWILSON,
Secy.

METROPOLITAN PHONOGRAPH CO.,

By CHAS. A. CHEEVER,
President.

[SEAL.] { Metropolitan
Phonograph
Company. }

232

Attest :

FELIX GOTTSCHALK,
Secretary.

I, JESSE H. LIPPINCOTT, Trustee, as provided in the
foregoing agreement, for good and valuable considera-
tion, on behalf of myself and my successor or successors,
hereby agree and consent that neither the said Twen-
ty-five hundred shares of stock of the party of the
second part, deposited as in said agreement provided,

- 233 nor any interest therein, shall be disposed of prior to the 12th day of October, 1893, and that all dividends which may meanwhile be earned and declared thereon or paid thereon to the Central Trust Company of New York, shall be immediately repaid and refunded by said Central Trust Company of New York to the party of the second part, and all rights to any dividends upon said stock so deposited are hereby waived and relinquished until the 12th day of October, 1893, and until that date the party of the second part, if it shall so elect,
- 234 may declare dividends only upon the remaining shares of stock ; and further, that said stock so deposited shall not be voted upon at any meeting of stockholders of the party of the second part prior to said 12th day of October, 1893 ; and I do hereby in all respects confirm the foregoing agreement, so far as I have any interest therein or thereunder.

Dated New York, June 23d, 1890.

JESSE H. LIPPINCOTT,
Trustee.

- 235 In presence of :
M. W. NOLAN.

The Central Trust Company of New York hereby accepts the execution of the foregoing trust and agrees to perform its provisions, and hereby acknowledges the receipt of certificate No. B 125 in the name of the Central Trust Company of New York, Trustee, for Twenty-five hundred shares of one hundred dollars each of the capital stock of the Metropolitan Phonograph Company deposited with it this eighteenth day of July, A. D. 1890.

236

CENTRAL TRUST CO. OF NEW YORK,
By G. SHERMAN,
Vice-President.

[ENDORSED :] " A " Special. The North American Phonograph Company to The Metropolitan Phonograph Company. Agreement extending License, &c. Dated June 23d, 1890. Deposited with Central Trust Company of New York, to be Delivered October 12th, 1893.

CIRCUIT COURT OF THE UNITED STATES, 3637

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK PHONOGRAPH COM-
PANY,
Complainant,

against

NATIONAL PHONOGRAPH COM-
PANY, *et al.*,
Defendants.

3638

Tomlinson, Tompkins & Tomlinson, for
Complainant.

Louis Hicks, John C. Tomlinson, Millard
F. Tompkins, of Counsel.

Robinson, Biddle & Benedict, for Defend-
ants.

William J. Wallace, Charles L. Bucking- 3639
ham, of Counsel.

HAZEL, J.,

This is a motion for an attachment against the
defendant, National Phonograph Company, for vio-
lating the injunctive decree of this court. After an
exhaustive discussion of the issues herein this court
at final hearing reached the conclusion that the
complainant was entitled to protection of its ex-
clusive license contract rights as evidenced by the
contracts dated October 12, 1888, February 6, 1889

3640 and July 1, 1893 (See 136 Fed. Rep., 600, for statement of facts and opinion), and its decree was subsequently affirmed by the Circuit Court of Appeals (144 Fed. Rep., 404). The effect of the injunction is disputed. It reads as follows:

“Now, therefore, we do strictly command, enjoin and restrain you, the National Phonograph Company, and you, its officers, agents, clerks, servants, employees, attorneys, successors, assigns, associates, dealers, confederates and all persons in privity with the National Phonograph Company, and each and every of you under the penalty that
3641 may fall thereon, practically from directly or indirectly selling or leasing within the State of New York, phonographs and supplies therefor, to others than complainant and from using within the State of New York, phonographs and supplies therefor, and from causing to be sold or causing to be leased or causing to be used, within the State of New York, phonographs and supplies therefor, by others than complainant, and from selling for use or licensing for use, within the State of New York, phonographs and supplies therefor, by others than complainant in violation of the provisions of and of the rights of the complainant under certain contracts as extended, bearing date October 12, 1888,
3642 between the North American Phonograph Company and the Metropolitan Phonograph Company and also between Thomas A. Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and Jesse H. Lippincott, and a contract bearing date the 6th day of February, 1889, between the North American Phonograph Company and John P. Haines, and a contract bearing date July 1, 1893, between complainant and the North American Phonograph Company.”

The question is, does the injunction restrain the use and sale by the defendant within the licensed territory of phonographs and supplies generally or does it simply restrain the use and sale in the licensed territory of phonographs and supplies which embody the patents and inventions of Thomas A. Edison owned by complainant's licensor as restricted by its dissolution for insolvency and the sale of its assets? 3643

The conclusions of the court that the rights of the complainant sprung from the contractual relation, that it was not chargeable with laches in the enforcement of its rights, that there was an extension of the license, that rights and privileges under the contract were not granted in perpetuity, that complainant's exclusive territorial rights at the date of the decree had been wrongfully invaded by the defendant and that the complainant had not forfeited its license rights must be regarded as *res judicata*. Assuming the jurisdiction of the court the rule is well settled that the order of the court must be strictly obeyed even though it appears to have been erroneously made or to have given broader relief than was justified or warranted by the facts. To adjudge the defendant guilty, however, of a violation of the injunction, resort must be had to the decision as interpreted and construed by the court. 3644 3645

The defendant contends that on the date of the injunction it abandoned and dispensed with the use in its talking machine of certain unexpired patents issued to Mr. Edison, and that no legal right exists to this proceeding. To intelligently pass upon the question presented we must not overlook the original contract by which the title of the phonograph patents and the territorial rights were granted "in perpetuity" nor the provisions bind-

3646 ing Mr. Edison to assign patents and improvements under certain conditions for a period of fifteen years from August 1, 1888. This court in its former decision held that a license to manufacture and sell a patented article could not be extended beyond the life of the patent and by the term "in perpetuity," the parties could not have intended, in the absence of express limitation, to prolong such license rights for a period beyond the life of any improvement or patented invention. The American Company by the contract of October 12, 1888, secured the exclusive title and interest in and to the
3647 phonograph patents, inventions and improvements for such period as the patentee then had or might, as provided in paragraphs four and five of the contract of August 1, 1888, thereafter acquire the monopoly of his inventions. It is inconceivable that the complainant could obtain any greater or different rights than had its licensor. Properly interpreted the decision of the court must be deemed to hold that the complainant did not buy the right to sell, use, or let phonographs and appliances separate and distinct from the patents under which they were manufactured. The language of the bill apparently supports this view. Moreover, the recitals
3648 is the numerous contracts emphasize the assignment of the phonograph patents and improvements. Concededly the phonograph and appliances are referred to in general terms also, yet, construing the original and subsequent contracts in their entirety, as we must to ascertain the intent of the parties, I think they intended to be understood as contracting in relation to phonographs and supplies which were invented by Mr. Edison and not in the broad sense contended by the complainant. The provisions of paragraphs four and five of the contract of August 1, 1888, are of essential importance. They

were wholly of an executory character and bound 3649
the North American Phonograph Company to pay
the sums of money specified for experimental ex-
penses. Failing in this undertaking such executory
provisions upon the dissolution of the said company
and sale of its assets became inoperative and in my
estimation Mr. Edison was not thereafter obliged to
make improvements or patent his inventions for the
benefit of the North American Company. (People
vs. Globe Mutual Ins. Co., 91 N. Y., 174; Griffith
vs. Boom & Lumber Co., 46 W. Va., 61; Cyc. Vol.
10, p. 1312; Bradford Belting Co. vs. Kisingen-
Ison Co., 113 Fed. Rep., 811). The confirmation 3650
agreement by which the Metropolitan Phonograph
Company received renewed assurances of its con-
tract rights notwithstanding the failure of Mr.
Lippincott and the North American Company to
comply with certain conditions of the earlier agree-
ment, did not suspend or annul the existing obli-
gation to perform or pay for the experimental ex-
penses in making improvements upon the phono-
graph and for procuring patents nor after the dis-
solution operate as a waiver thereof. It is probable
if creditors or parties in interest had offered to
perform the contract of the North American Com-
pany prior to sale of its assets that Mr. Edison 3651
could have been compelled to assign his later in-
ventions or improvements; but without compensat-
ing him for experimental expenses or paying for the
patents of the improvement subsequent to the dis-
solution, I am unable in the absence of fraud to
perceive any force in the contention that the com-
plainant is entitled to the benefits of such later im-
provements. The fourth paragraph provides that
inventions and improvements should be assigned
to the company "without further compensation,"
but Mr. Edison probably would not have been

3652 obliged to conduct any experiments as a result of which improvements could have been made unless remunerated as specified in the fifth paragraph. The compromise agreement with the receiver of the North American Phonograph Company specifically refers to claim for royalties and damages and not to payment of the annual amounts under paragraph five. It is true that the principle of the cases cited in my former opinion is substantially to the effect that a purchaser of the assets of an exclusive licensor of a patent with notice of the existence of license rights succeeds to the ownership of the patent and the rights and responsibilities of the licensor. This principle, however, is not thought broad enough to justify the holding in this case that the defendant was bound to fulfill the conditions imposed by paragraphs four and five, which, as we have seen, complainant's licensor was unable to perform.

3653 The so-called negative covenant. The Haines contract dated February 6, 1889, in the first provision prohibited similar grants to others of any rights for the use of the phonographs or supplies therefor, for the licensed territory during the period for which the license was granted. Much reliance
3654 is placed by complainant upon the phraseology of this provision which refers in broad terms to phonographs and phonographic supplies. There are other portions of the contract from which it may fairly be argued that all "phonographs delivered were to be phonographs of the contract," that is to say, that the grantors could not sell or license phonographs of any kind patented or unpatented except by permission of the licensee, yet the contracts in their entirety together with the situation and circumstances are believed to require a restriction of the negative covenants of the complainant's pred-

ecessors to the phonographs and phonographic sup- 3655
plies manufactured under the Edison patents and
improvements prior to the dissolution of the Amer-
ican Company and the sale of the assets. Clause
four of the agreement of February 6, 1889, seems to
support such view, for it states that the phono-
graphs and supplies which were agreed to be de-
livered to complainant were "made and to be used
under the patents and rights herein described dur-
ing the continuance of this agreement."

I now come to the consideration of the question,
Has the defendant in the production of its talking 3656
machine used the patents, inventions and improve-
ments made by Mr. Edison during the period from
August 1, 1888, to February 18, 1896, the time of
sale of the assets of the North American Phon-
ograph Company? The affidavits read on the mo-
tion show that the so-called gold moulded records
used by the defendant in the State of New York
were manufactured under Edison's basic patent No.
484,582, dated October 18, 1892. The defendant
contends that such patent is not infringed by the
use or sale of its product and to sustain infringe-
ment that it must be proven that the defendant
actually produced the process within this state.
Inasmuch, however, as the rights of the complain- 3657
ant were contract rights, this contention is not
maintainable. That said process for sound pro-
ducing records was manufactured by the Edison
Phonograph Works and is used and sold by the de-
fendant corporation to its customers, jobbers and
agents in the licensed territory is undeniable. That
the process was trivial and a mere feature or step
in the general process resulting in a mold for
making the record is thought unimportant. Ed-
ison patents Nos. 414,760 of November 12, 1889,
430,274 and 430,278 of June 17, 1890, were used by

- 3658 the defendant at the date of the injunction and in violation thereof, although such patents have since expired. And the unexpired patents Nos. 448,780, of March 24, 1891, 465,972 of December 29, 1891, 484,583 and 484,584, of October 18, 1892, 499,879 of June 20, 1893, and 513,097 of January 28, 1894, are used by the defendant in the manufacture of its photographs and supplies and, moreover, are used, let or sold in the State of New York through its jobbers, dealers or selling agents in violation of complainant's exclusive rights. The defendant also continues to wrongfully use patent No. 713,209,
- 3659 issued November 11, 1902, subsequent to the insolvency of complainant's licensor. Such invention was held to have been made in 1888, as appears from the decision of the Circuit Court of Appeals, in *National Phonograph Company vs. Lambert* (142 Fed. Rep., 164). The defendant asserts that some of the patents enumerated are invalid for lack of invention or prior use and that others which had first been patented in foreign countries have expired. Under the circumstances of this case the defendant must be estopped to deny the validity of the patents in suit granted to Mr. Edison against this
- 3660 complainant. (*Mathews Co. vs. Listner*, 154 Fed. Rep., 490 ; *Mellor vs. Carroll*, 141 Fed. Rep., 992 ; *Hurwood Co. vs. Wood*, 138 Fed. Rep., 832 ; *Continental Co. vs. Pendergast*, 126 Fed. Rep., 381 ; *Consolidated Co. vs. Finley Co.*, 116 Fed. Rep., 629 ; *Force vs. Sawyer Co.*, 111 Fed. Rep., 902). These adjudications emphasize the point that a patentee and a corporation controlled by him are in privity and both are estopped to assert the invalidity of the patent against an assignee thereof. Nor can the defendant successfully insist that such patents have expired since a prior foreign patent for similar in-

vention has become the property of the public. 3661
(United Shoe Machinery Co. vs. Caunt, 134 Fed. Rep., 239.) The Revised Statutes, Section 4887, provide that patents which have been patented previously in a foreign country shall be limited to expire with the foreign patent, but as the right of the complainant was derived from the exclusive license in controversy in limitation contained in the statute is believed to be inapplicable. The United States Edison patents on their face conveyed monopoly rights for a period of seventeen years and they make no reference to any foreign patents. Although in United Shoe Machinery Co. vs. Caunt, *supra*, the defendant expressly obligated himself 3662 not to contest the validity of a patent licensed by him, I regard the principle announced there as not inapt to the case at bar.

The next point argued by counsel for defendant is that the defendant can without violating the terms of the injunction sell and license in New Jersey phonographs and phonographic supplies for use in the territory licensed to the complainant. This question is not open for review or further consideration. In the former decision it was held for reasons there stated that the defendant had wrongfully invaded the territory of the complainant. 3663

A case of unlawful use of the patents and inventions hereinbefore specified in complainant's territory and a violation of the injunction granted on March 26, 1906, has been made out and such use of the phonographs and supplies having been intentional, the defendant is guilty of contempt.

The record of the trial and of this motion and briefs submitted are tremendously voluminous. The expenses of complainant for printing, etc., and preparations of this motion must have been large. Under the circumstances the judgment of the court

3664 is that the defendant pay a fine of two thousand and five hundred dollars, one thousand five hundred dollars of which shall be paid to the complainant for expenses incurred in the prosecution of this motion and the remainder to the United States. (Christen Eng. Co. vs. Westinghouse Co., 135 Fed. Rep., 774.)

Attachment may issue accordingly.

Endorsed: Circuit Court of the United States for the Southern District of New York—New York
3665 Phonograph Co., Complainant, vs. National Phonograph Co., *et al.*, Defendants—Opinion, Hazel, J.—U. S. Circuit Court, Southern District of N. Y., Filed Feb. 5, 1908. John A. Shields, Clerk.

3666

CIRCUIT COURT OF THE UNITED STATES, 3901

FOR THE SOUTHERN DISTRICT OF NEW YORK.

NEW YORK	PHONOGRAPH COM- PANY, Complainant,	}
	AGAINST	
NATIONAL	PHONOGRAPH COM- PANY, <i>et al.</i> , Defendants.	

3902

On Motion for Re-argument.

TOMLINSON, TOMPKINS & TOMLINSON, for
Complainant.

LOUIS HICKS, JOHN C. TOMLINSON, MIL-
LARD F. TOMPKINS, of Counsel.

ROBINSON, BIDDLE & BENEDICT, for Defend-
ants.

WILLIAM J. WALLACE, CHARLES L. BUCK- 3903
INGHAM, of Counsel.

HAZEL, J.

It is insisted by the defendant on this motion that it has not used or employed the so-called expansion process specifically described in the Edison Patent, No. 713,209, since the issuance of the injunction herein; in fact, that its cylindrical records are manufactured under what is known as the casting process covered by letters patent No. 683,615, dated Oc-

3904 tober 1, 1901, to Miller and Aylsworth, which is claimed to be radically different from the expanding process. Complainant rejoins that such processes are equivalent, and, moreover, that claims 2 and 3 of the Edison Patent properly construed include the precise process used by the defendant. The record discloses that as early as October 26, 1888, Mr. Edison filed a caveat in the patent office covering the process described in his patent for duplicating phonograms, which patent was issued to him more than ten years later. That Mr. Edison regarded the invention as a pioneer in the art notwithstanding the issuance to him of several other patents in 1888, covering the process is clearly evident from the opinion of the Circuit Court of Appeals in National Phonograph Co. vs. Lambert Co. (142 Fed. Rep., 164), where the patent was held void for prior public use and from the testimony of defendant's witness Dyer quoted in the defendant's brief. It may be safely concluded that although the application for the patent was not filed until March 5, 1898, the invention was actually conceived and used in 1888.

3906 The difference between the expanding and the casting processes for making phonograms is as follows: In the expanding process the blank cylinder having a smooth surface of waxlike material is inserted within a tubular mold which carries on its inner surface a negative presentation of the record; the blank by application of heat or internal pressure is expanded outwardly and is then contracted or shrunk by process of chilling. In the casting process the annular tubular mold or matrix having the record in relief on the inner surface is placed in a vat of molten wax; the chill of the mold causes the wax to congeal within it, forming a deposit of predetermined thickness. The interior of the record is then reamed out and chilled to cause its

shrinkage or contraction from the inner side of the mold and allowing its easy removal. Claims 2 and 3 of the patent under discussion broadly specify a hollow cylindrical plastic phonogram which is formed within the matrix having a reverse phonogram-record on the inside wall, while claims 4, 5 and 6 specifically provide for forming the wax blank prior to its insertion in the matrix and then applying heat or internal pressure thereto to produce the required expansion and its subsequent contraction by chilling to enable its withdrawal from the mold. 3907

To emphasize the pioneer character of the invention complainant points out that claims 2 and 3 were expressly inserted in the patent to bring about an interference in the patent office with the application of one Joyce, which involved both the casting and the expanding processes and that said interference resulted in narrowing the Joyce patent. This would seem to conclusively indicate the scope attributed to the invention by the patentee. Indeed, the defendant admits that prior to the decision in the National Phonograph Co. vs. American Co. (135 Fed. Rep., 809) the claim was insisted upon that the patent was of pioneer scope and included both the expansion and casting processes. But the defendant now relies upon the decision last mentioned where it was held by Judge Platt that claims 2 and 3 were limited to expanding the blank within the matrix and that the casting process, though claimed by the patentee, was not included in the scope of the patent. The defendant urges that as the scope of the patent has been limited by such decision to the expanding process, the complainant cannot now be heard in favor of a broad construction to cover the defendant's present method of making records. Judge Platt did not have before him the proofs showing the earlier conception by Mr. Edison of the processes mentioned and upon the limited showing 3908 3909

3910 before him of the state of the art he properly restricted the scope of the patent. That Edison was the pioneer in the record making art of the class under consideration is clear. That is to say, he was the first to make a suitable tubular mold or matrix for forming within it a waxlike phonogram-record and then shrinking or contracting the same to enable its removal from the mold. In my estimation claims 2 and 3 as to the complainant are entitled to a construction of sufficient scope to include the casting or dipping process or a process of making records equivalent to that which is described and claimed by the patentee.

3911 A different rule controls this controversy than in a case where the patent is claimed to have been infringed by a stranger. In view of the peculiar situation and circumstances springing from the contract rights the defendant is estopped to limit the patent and eliminating from its apparent scope a process which was claimed to be included therein. No limitation is found in the assignment of the patent; what was actually included in the invention became the property rights of the assignee and the asserted claim of the assignor regarding the scope of the patent became of material importance. It

3912 is not wholly a question of legal construction of the patent to determine whether there has been an infringement of the claims; such rights as the complainant has are found in the contract of license as heretofore interpreted by this Court.

It is unnecessary to dwell upon the different decisions enunciating conflicting doctrines of estoppel. This case is thought to stand peculiarly by itself, and I think complainant should have the full benefit of the unexpired patents and inventions under which the phonograph was manufactured in 1888, and while the contract was in force. The complainant is entitled to a fairly liberal considera-

tion of the questions presented and therefore the 3913
interpretation which the defendant and Mr. Edi-
son have hitherto placed upon the patent consider-
ed in connection with claims 2 and 3 is entitled to
weight. It indicates the understanding of the par-
ties to the contract in relation to the character and
scope of the patents and inventions assigned to the
North American Phonograph Company. For
the foregoing reasons the defendant is es-
topped to deny the validity of the patent
or to invoke the prior art to limit or narrow the
claims as allowed by the patent office. (Siemens-
Halske Elec. Co. vs. Duncan Elec. Co., 142 Fed. 3914
Rep., 157; United States vs. Harvey Steel Co., 196
U. S., 310.) Upon this point there is no scarcity
of authority justifying the application in a proper
case of the principle invoked. (See cases cited in
former opinion on this motion; see also Time Tele-
graph Co. vs. Himmer, 19 Fed. Rep., 322.)

Other propositions discussed in the briefs do not
call for any modification of the views of the court
heretofore expressed. The motion for rehearing is
denied. The order of attachment will be withheld
as requested by the defendant, sufficient cause hav-
ing been shown, for a period of sixty days from
February 21st, 1908, the date when the motion for 3915
settlement of the order was heard. If within that
time the defendant appeals from this decision to
the Circuit Court of Appeals then the attachment
will be stayed until the determination of such ap-
peal, provided, of course, that the appeal is per-
fected and prosecuted within a reasonable time.

So ordered.

3916 (Endorsed) Circuit Court of the United States, Southern District of New York. In Equity. New York Phonograph Co., Complainant, vs. National Phonograph Co. *et al.*, Defendants. Opinion. On Motion for Reargument. Hazel, J. U. S. Circuit Court, Southern District of N. Y. Filed Mar. 26, 1908, John A. Shields, Clerk.

3917

3918

At a Stated Term of the Circuit Court 3919
of the United States for the
Southern District of New York,
held in the court room in the
Post Office Building in the City
and County of New York on the
6th day of April, 1908.

Present—Hon. JOHN R. HAZEL, U. S. Judge.

NEW YORK PHONOGRAPH COM-
PANY,

Complainant,

vs.

NATIONAL PHONOGRAPH COM-
PANY, impleaded with Thomas
A. Edison, Edison Phono-
graph Company and the Edi-
son Phonograph Works,
Defendants.

3920

In Equity.

No. 7719.

Order

Adjudging

Defendant in

Contempt.

The motion of Complainant, New York Phono- 3921
graph Company, to attach defendant, National
Phonograph Company, its officers, etc., for con-
tempt of court having come on to be heard before
this court pursuant to the order to show cause upon
said motion, and having been argued by Louis
Hicks and John C. Tomlinson, Esqrs., of counsel
for complainant, and by William J. Wallace and
Charles L. Buckingham, Esqs., of counsel for de-
fendant, on the 30th and 31st days of October,
1907; and the court, upon due deliberation and

- 3922 consideration of the order to show cause, affidavits, exhibits and briefs presented in support of and in opposition to said motion and of the record of the proceedings theretofore had in the cause, having found that defendant, National Phonograph Company, violated the writ of injunction of this court issued on March 26, 1906, pursuant to the decree therefor of this court, entered herein May 2, 1905, and served on defendant on March 27, 1906, in that said defendant after service and notice of said injunction sold and used, and caused to be sold and used, and made, sold and licensed for use, phonographs and phonograph supplies within the State of New York, containing or made according to the inventions and improvements made by Thomas A. Edison during the period prior to February 18th, 1896, of the following named patents, to wit: Patents Nos. 484,582, dated October 18, 1892; 414,760, of November 12, 1899; 430,274 and 430,278 of June 17, 1890; 448,780, of March 24, 1891; 465,972, of December 29, 1891; 448,583 and 484,584 of October 18, 1892; 499,879, of June 20, 1893; 513,097, of January 23, 1894; and 713,209, of November 11, 1902, in violation of the provisions of and of the
- 3924 rights of complainant, New York Phonograph Company, under certain contracts as extended referred to in said decree and writ of injunction; and it appearing to the court from the evidence before it that the sum of One thousand five hundred dollars (\$1,500) is a proper sum to be paid by defendant to complainant as compensation for expenses incurred by complainant in the prosecution of said motion, and defendant, National Phonograph Company, being guilty of an intentional violation of the said writ of injunction granted on March 26, 1906.

And defendant, National Phonograph Company, having moved for a re-hearing upon the question

whether the opinion of the court should not be 3925
amended, modified or changed by erasing, eliminat-
ing or modifying the following statement and find-
ing, to wit :

“ The defendant also continues to wrongfully
use patent No. 713,209, issued November 11,
1902, subsequent to the insolvency of com-
plainant's licensor. Such invention was held
to have been made in 1888, as appears from the
decision of the Circuit Court of Appeals in
National Phonograph Co. v. Lambert (142 Fed.
Rep., 164),”

and for such other and further relief in the prem- 3926
ises as to the court may seem proper, and said mo-
tion for re-hearing having come on to be heard be-
fore this court pursuant to the order to show cause
therefor and having been argued by William J.
Wallace and Charles L. Buckingham, Esqs., of
counsel for defendant, and by Louis Hicks, Esq., of
counsel for complainant, on the 12th day of March,
1908, and the court, upon due deliberation and con-
sideration of the order to show cause, affidavits, ex-
hibits and briefs presented in support of and in op-
position to said motion for rehearing, having filed
an opinion holding that for the reason therein stat-
ed said motion for rehearing should be denied ;

Now, on motion of complainant, New York Phon- 3927
ograph Company, it is ordered, adjudged and de-
creed as follows :

First : That said motion for rehearing be and the
same hereby is denied.

Second : That the said National Phonograph
Company is in contempt of court for having vio-
lated, as aforesaid, the said writ of injunction
which was issued on March 26, 1906, under the de-

3928 decree of this court entered May 2, 1905, and which
was served on defendant on March 27th, 1906, and
that a fine be and hereby is imposed upon the said
National Phonograph Company of Two thousand
five hundred dollars (\$2,500), to be paid within
sixty days from February 21, 1908, as follows : One
thousand five hundred dollars (\$1,500) to com-
plainant or its counsel and One thousand dollars
(\$1,000) to the Clerk of this court, said One thou-
sand dollars (\$1,000) to be turned over and paid
by said Clerk to the United States, and it appearing
that the disobedience of the injunction was not de-
fiant or wholly intentional, it is ordered and ad-
judged that the National Phonograph Company
have sixty days from February 21, 1908, in which
to discontinue or abandon the use of said inventions
and patents of Thomas A. Edison in the production
of machines and appliances therefor and

Third : That if within sixty days from February
21, 1908, defendant, National Phonograph Com-
pany, appeals herefrom, by writ of error or other-
wise, to the United States Circuit Court of Ap-
peals for the Second Circuit and shall file with the
Clerk of this court a good and sufficient bond, to be
3930 approved by said Clerk to secure the payment of
said fine, the collection of said fine and all proceed-
ings therefor, by attachment or otherwise, shall be
stayed until the determination of the Circuit Court
of Appeals upon such appeal, provided, however,
that the said appeal shall be prosecuted within a
reasonable time.

JOHN R. HAZEL,
U. S. Judge.

Endorsed : Circuit Court of the United States, 3931
Southern District of New York—New York Phonograph Company, Complainant, against National Phonograph Company, *et al.*, Defendants—Order—Tomlinson, Tompkins & Tomlinson, Attorneys for Complainant, Mills Building, 35 Wall Street, New York City—To Hon. John R. Hazel, U. S. Judge—Copy received Apr. 1, 1908. Robinson, Biddle & Benedict—U. S. Circuit Court, Southern District N. Y.—Filed Apr. 7, 1908. John A. Shields, Clerk.

3932

3933

NEW YORK PHONOGRAPH CO. v. DAVEGA.

(SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT, JUNE 5, 1908.)

[p. 365] Appeal from Special Term, Westchester County.

Suit by the New York Phonograph Company against Solomon B. Davega to enjoin defendant from purchasing certain patented articles from another, and for an accounting. From an interlocutory judgment for plaintiff, defendant appeals. Reversed.

Argued before WOODWARD, JENKS, HOOKER, MILLER and GAYNOR, JJ.

EDWARD W. HATCH (CHARLES L. BUCKINGHAM, on the brief), for appellant.

SAMUEL F. HYMAN (JOHN P. COHALAN, on the brief), for respondent.

MILLER, J. The precise relation of the parties and their rights and obligations under the different contracts involved in somewhat complicated transactions must be ascertained before attempting to deal with the questions presented by this appeal. I shall content myself with a statement of my conclusions as to the effect of said contracts, so far as such conclusions seem to be obvious, and shall eliminate all details which do not appear to have an important bearing on the questions to be decided.

Prior to June 28, 1888, Thomas A. Edison, the inventor of the phonograph, organized and on that date controlled two corporations, the Edison Phonograph Company and the Edison Phonograph Works. The former undertook to exploit his said inventions in the United States and Canada, and to it he assigned his patents and was to receive certain royalties. The latter was given the exclusive right to manufacture the

patented articles. One Jesse H. Lippincott was the sole licensee of the American Graphophone Company, the owner of certain inventions, protected by letters patent, covering the graphophone. Pursuant to contract with said Edison, made June 28, 1888, said Lippincott organized the North American Phonograph Company for the purpose of uniting the control of said two inventions. Pursuant to contracts executed by all of said parties, said North American Phonograph Company undertook, and was give the exclusive right, to exploit and introduce commercially the phonograph and graphophone in the United States and Canada, and said Edison agreed to and did assign to it the stock of said Edison Phonograph Company, which he owned, in consideration of the payment of \$500,000, which by the agreement of June 28 was to be paid as follows, viz.: \$10,000 on July 13, 1888, \$115,000 on September 1, 1888, \$125,000 on October 1, 1888, and \$250,000 on November 1, 1888. It was also provided by said agreement that the obligations of said Edison thereunder should cease in case a default in said payments should be made and continued for ten days, or in case said North American Phonograph Company should fail or refuse to execute the contracts contemplated. Pursuant to said agreement, said Edison entered into a contract with said North American Phonograph Company under date of August 1, 1888, whereby he agreed to assign to it without further consideration any invention or improvement on the phonograph as it then existed which he might make within fifteen years, also any invention of a special phonograph or special extra, or by which the use of the phonograph could be extended, which he might make with- [p. 366] in said period, and said company agreed to pay a stated royalty on the articles covered by said last-mentioned inventions; to pay all expense of taking out the patents, and to allow him for experimental work \$15,000 the first year, \$10,000 the second year, \$7,500 the third year, and \$5,000 yearly for ten years thereafter. Said company entered into contracts with the Manhattan [Metropolitan] Phono-

graph Company and the New York Phonograph Company, the plaintiff's predecessors. For brevity I shall consider said contracts as a single contract made with the plaintiff, and shall not discuss the so-called extension or suspension agreements or the effect of the deposit of the certificates of stock of the plaintiff's said predecessors and the notice of the plaintiff to the depository not to deliver them, but shall assume, as the plaintiff contends, that said contracts as extended continued in force. In said contracts said North American Phonograph Company was described as lessor and licensor, and the plaintiff's predecessors as lessees and licensees. In consideration of the sum of \$225,000 and the delivery of \$500,000 of the capital stock par value of the plaintiff's predecessors, said licensor granted to the plaintiff the exclusive right to use, exhibit, sublet, and sell in the State of New York, the phonograph and its appliances until the 26th day of March, 1903, and for such further time as said licensor might be authorized to grant such rights, subject to the right of either party to terminate the contract for the reasons and in the manner therein stated, and expressly agreed not to grant similar rights or any rights for the use of the phonograph or phonographic appliances for said territory or any part thereof, while said agreement remained in force. It was contemplated that said licensor would supply the patented articles for lease or sale, and the contract contained express provisions prescribing the conditions under which that should be done, and provided that in case of a failure to supply the demand the licensee should have the right to obtain machines to the extent of such failure through other agencies, and the right to manufacture them or to cause them to be manufactured. **I do not discuss the point argued by the plaintiff that the term of said contract was not limited by the life of the patents owned or controlled by the licensor, or which it might become entitled to under its contract with Mr. Edison, as that position is obviously unsound.** The parties understood when said

contract was made that all of the patents then in force would expire before or during the year 1905 and the continuance of the contract beyond that time depended on the making of subsequent inventions by said Edison, which said licensor should become entitled to as aforesaid. On the 12th of October, 1888, the so-called confirmation agreement was made by said Edison, the Edison Phonograph Company, the Edison Phonograph Works, the North American Phonograph Company and said Lippincott. It recited that the North American Phonograph Company desired to grant a license to the Metropolitan Phonograph Company, one of plaintiff's said predecessors, and authorized that to be done as fully and completely as if the prior agreements of the parties thereto had been performed. The payments provided for by the contract of June 28th had not all been made, and it was stated to be the intention of said confirmation agreement not to annul or impair any of the rights or benefits conferred on [p. 367] said licensee by reason of the non-performance of said agreement of June 28th, but to grant said rights as fully and completely as though said agreement had been in all respects performed, and in the same contract said North American Phonograph Company and said Lippincott agreed that they would keep and perform all agreements with said Edison, the Edison Phonograph Company and the Edison Phonograph Works, as fully and completely as if said agreement of June 28th had been in all respects performed. The plaintiff's said predecessor was not a party to said confirmation agreement and it is obvious that its sole purpose was to enable said North American Phonograph Company to do immediately what all understood it would be able to do after all conditions precedent had been performed, and so far as the effect or validity of said license was concerned to waive any breach of said agreement of June 28th. By that contract Mr. Edison was estopped to allege any such breach against the validity of the license granted to the plaintiff's said predecessor, **but he did not thereby become a party to said license**

agreement and he was not a party to any agreement made with the plaintiff or its said predecessors.

The business contemplated by the parties to the different contracts hereinbefore referred to was not as successful as they anticipated, and in 1894 said North American Phonograph Company became insolvent, and a receiver of it was appointed by the Chancery Court of New Jersey. On the 8th day of February, 1896, the assets of said insolvent company were sold by the receiver at public auction pursuant to a decree of said court, and Mr. Edison being the sole and highest bidder became the purchaser, paying \$50,000 for the stock of the Edison Phonograph Company and \$50,000 for the other assets, which included his patents and the various contracts of said Company. He assigned his bid to the National Phonograph Company, a New Jersey corporation then recently incorporated, and it assigned to a Mr. Ott its interest in said contracts under said bid. Said receiver transferred to said National Phonograph Company the stock of the Edison Phonograph Company and the patents owned by the insolvent, and assigned said contracts to said Ott, who agreed to perform the several stipulations, covenants and agreements therein made by said North American Phonograph Company. The said National Phonograph Company proceeded to develop the business independently of the licensees of said North American Phonograph Company, and to sell the patented articles through other parties with whom it made so-called jobbers' or dealers' agreements. The defendant is purchasing said articles from said company at Orange, N. J., and selling them in the State of New York. This action was begun June 19th, 1906, to enjoin the defendant from so doing, and for an accounting.

The trial court found that none of the inventions of Mr. Edison, other than for factory processes made prior to the sale of the assets of the North American Phonograph Company, and used by the National Phonograph Company in the manufacture of phono-

graphs, records or supplies, were in force at the time of the commencement of this action, all either having expired by reason of the expiration of the [p. 368] term of the patent or by reason of shorter term foreign patents, or having been discarded, but that an invention was made by Mr. Edison for which a patent was applied for on the 1st day of August, 1903, the last day of the 15 years subsequent to August 1st, 1888, and that letters patent were issued thereon on August 9, 1903. **That finding is the basis for the conclusion of law that the plaintiff is entitled to an injunction running until August 9th, 1921, and for the judgment appealed from.**

The respondent's position is that the National Phonograph Company is the successor of the North American Phonograph Company; but that position is untenable. N. Y. Bank Note Co. v. Hamilton B. N. Co., 180 N. Y., 280, 73 N. E. 48. The National Company purchased through Mr. Edison the assets of the North American Company at receiver's sale pursuant to a judicial decree. **There was nothing in that decree which required the purchaser to assume the obligations of the insolvent company, and the purchaser at a judicial sale of the assets of an insolvent corporation does not assume the latter's obligations.** Hoard v. Chesapeake & Ohio Railway, 123 U. S., 222, 8 Sup. Ct. 74, 31 L. Ed. 130; Sullivan v. Portland, &c., R. R. Co., 94 U. S. 806, 24 L. Ed. 324. There is a finding "that such acts [referring to acts set forth in previous findings] were done pursuant to a scheme or plan and as an expedient and device to unlawfully invade the said exclusive territory of this plaintiff." **But so far as that may refer to the appointment of a receiver of the North American Phonograph Company, the sale of its assets, and the purchase thereof by the National Phonograph Company, there is no evidence to support it.** It is unquestioned that the North

American Phonograph Company was insolvent, a receivership was necessary, and **Mr. Edison or a company organized by him had as much right to purchase the assets as anybody had.** In fact, his purchase was probably fortunate for the creditors. **He may have intended that the new Company organized by him should proceed to develop the business independently of the lessees or licensees** of the North American Phonograph Company in whose hands it had proved a failure, **but that has nothing to do with the rights acquired or the obligations assumed by the National Phonograph Company.** There was no privity of contract between it and the plaintiff, or between Mr. Edison and the plaintiff. Neither it nor Mr. Edison could invade the plaintiff's rights; but we must first ascertain what those rights were. Obviously they must be determined as of the date of the receiver's sale. At that time the plaintiff had the exclusive right to use, exhibit, sublet, or sell in the State of New York the articles covered by the patents owned by the insolvent company or controlled by it through its ownership of the Edison Phonograph Company, and, if necessary, to manufacture for that purpose. It could only become entitled to similar rights in the subsequent inventions of Mr. Edison, in case its licensor, the said North American Phonograph Company, became entitled to them under its contract with him; but the provisions of such contract as to future inventions **were wholly executory. He was not obliged to assign his rights in such inventions, unless it performed [p. 369] its part of the agreement, i. e., paid the expense of taking out the patents and allowed him the stipulated sum for experimental work. When it became incapacitated to perform by reason of insolvency and the sale of its assets, his agreement so far as it was executory ceased; and there is no pretence that it or any one claiming under it has performed. Moreover, under its con-**

tract with him it was to exploit his inventions and to purchase the patented articles from the Edison Phonograph Works, a corporation which he controlled, and, when it ceased to be able to do that, his obligation to make inventions for the benefit of it or its licensees, with whom he had no contract relations ceased. Its contract with him was peculiarly personal. He was vitally interested in the manner in which it performed, and said contract was not in terms or in its nature assignable. *N. Y. Bank Note Co. v. Hamilton B. N. Co.*, *supra*. **By purchasing the assets of the insolvent company and assigning his bid, he incurred no obligation except to pay the purchase price.** Any property rights in the licensees of the insolvent company arising under its contracts were not affected by its insolvency and the sale of its assets (*People v. National Trust Co.*, 82 N. Y., 283), but **so far as such contracts remained executory** and were dependent upon the continued existence of the corporation, **they were terminated by its dissolution** (*People v. Globe Mut. Life Ins. Co.*, 91 N. Y., 174). I speak of it as a dissolution, because that was the practical effect of the sale by the receiver of all its assets. It does not appear that there was a formal decree dissolving the corporation; but whether the corporation was formally dissolved or not, so far as its contract with the plaintiff remained executory, the remedy of the latter for a breach was against it; and, if any part of such executory provisions survived its insolvency and the sale of its assets, the plaintiff would have to stand the same as any creditor, and, upon proving its damage, take its *pro rata* share on a distribution by the receiver. It may be that a new contract resulted from the agreement of said Ott, which the plaintiff could enforce against him if it has ever put itself in a position to do so, but we have no such question, and upon the proof before us the National Phonograph Company, the defendant's vendor, is not concerned with it. I am not

saying that Mr. Edison could wreck the North American Phonograph Company for the purpose of acquiring its assets and destroying the value of the plaintiff's contract without being answerable in some form of action, for I believe the law is adequate to deal with every wrong, but, while much is said by the learned counsel for the respondent on that subject, there is no proof whatever in the record to warrant it. The rights of the licensees of the said insolvent company in the inventions of Mr. Edison made subsequent to the receiver's sale have not been passed on in the many decisions of the federal courts called to our attention save in the cases of *N. Y. Phonograph Co. v. Edison and Others* (C. C.) 136 Fed. 600, and *New York Phonograph Co. v. National Phonograph Co.*, 144 Fed. 404, 75 C. C. A. 382. As I understand the judgment in that case as elucidated by the subsequent opinion of Judge HAZEL, not yet officially reported (161 Fed.—), rendered on the motion for an attachment for violating the decree, it was limited to the inventions of Mr. Edison made prior to the receiver's sale. **This conclusion requires a reversal of the judgment, but we should not reverse without disposing of the question of jurisdiction.**

On that question we are not concluded by the decisions of the federal courts. See *New England Phonograph Co. v. Edison* (C. C.), 110 Fed. 26; *New York Phonograph Co. v. Natl. Phonograph Co.* (C. C.), 112 Fed. 822; *Rahley v. Columbia Phonograph Co.*, 122 Fed. 623, 58 C. C. A. 639; *Whitson v. Columbia Phonograph Co.*, 18 App. D. C., 565; *New York Phonograph Co. v. Edison* (C. C.), 136 Fed. 600; *New York Phonograph Co. v. Nat. Phonograph Co.*, 144 Fed. 404, 75 C. C. A. 382; and the other decisions called to our attention. All of those decisions, save the last, were made on demurrer or on application for an injunction *pendente lite*, and the question was whether the bill was good, or whether a *prima facie* case was made appealing to the discretion of the court. Those decisions were made on the theory that contract,

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not patent, rights were involved; that the North American Phonograph Company impliedly covenanted with the plaintiff not to invade the territory in which the latter was granted exclusive rights, and that the National Phonograph Company was the successor of the said North American Phonograph Company. Those conclusions may have been warranted by the allegations of the bill or by the *prima facie* case made, **but, as already shown upon the record before us, said National Phonograph Company was not the successor of the insolvent.** Judge HAZEL in the case of this plaintiff against the National Phonograph Company (*supra*), followed said decisions, but, as we have seen, **he held that the plaintiff's rights were to be determined as of the date of the receiver's sale,** and it does not seem that it was material to that decision whether said rights were regarded as **contract or patent rights.** Assuming that the decision is binding on the defendant in this case, as the respondent seems to contend, it only concludes him upon the point actually decided; *i. e.*, that it was unlawful for the National Phonograph Company, his vendor, to trespass upon the exclusive rights of the plaintiff under the patents owned or controlled by the said North American Phonograph Company at the time of the receiver's sale—a proposition that does not need to be supported by the rule of *res adjudicata*.

The jurisdiction of this court is invoked on the ground that the suit is to enjoin the violation of a negative covenant, express or implied; and I shall assume for the purpose of the discussion that the North American Phonograph Company was under covenant with the plaintiff not to invade the latter's territory. Undoubtedly a suit to restrain the violation of such a covenant may be maintained against the covenantor or any one conspiring with said covenantor to violate it; **but neither the defendant, his vendor, nor Mr. Edison, is under any covenant with the plaintiff, and I am unable to perceive how a suit strictly to enjoin the breach of a**

covenant can be maintained unless some one bound to discharge the covenant participate in its violation. Certainly none of the cases relied upon support any such [p. 371] proposition. In *N. Y. Bank Note Co. v. Hamilton B. N. Co.*, *supra*, and *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y., 60, 51 N. E., 408, 43 L. R. A., 854, 68 Am. St. Rep., 749, the covenantor was one of the defendants; and *Murphy v. Christian Press, etc., Co.*, 38 App. Div., 426, 56 N. Y. Supp., 597, *Lewis v. Gollner*, 129 N. Y., 227, 29 N. E., 81, 26 Am. St. Rep., 516, and similar cases, were not suits to restrain the breach of covenants, but the violation of property rights. Those cases were decided upon the theory that the owner of property, whether real or personal, may by contract so restrict its use as to confer upon another a species of property interest in it, and that a purchaser with notice gets only the restricted title. Such purchaser may be sued to restrain the particular use of the property, not because he has covenanted not to so use it, but because he cannot trespass upon the special property rights which he knew another had in the property when he bought it. The most common application of the principle is in suits to restrain the violation of negative easements, and it is familiar law that in such cases privity of contract or estate between the parties is unnecessary, the action being one to restrain the invasion of property rights, not the breach of a covenant. *Lewis v. Gollner*, *supra*, was a suit to restrain the violation of a negative easement which attached to the land when purchased by one of the defendants, and was not affected by a conveyance to his wife, who took with notice. *Murphy v. Christian Press, etc., Co.*, *supra*, was a suit involving personal property, but was decided by analogy with the cases involving negative easements in real estate. *Apollinaris Co. v. Scherer (C. C.)*, 27 Fed., 18, is cited to sustain the respondent's contention, but it seems to me to be a plain authority the other way. In that case an injunction was denied because there was no privity between the defendant and the plaintiff's covenantor.

A trade-mark was incidentally involved in that case, but it was held that it was not being infringed because the genuine article was being sold. Judge WALLACE in that case pointed out how the plaintiff might have succeeded if territorial rights under a patent had been involved, but held that, as the plaintiffs' rights rested purely in covenant, it could not succeed, thus making the distinction between a contract case and one arising under the patent laws of the United States. If the case arises under a contract and is to enforce a covenant, it does not matter that it may involve a question under the patent laws. If it arises under the patent laws, it does not matter that it may also involve the construction of a contract. The distinction between a case and the question arising under a contract for the patent laws is made plain in *Littlefield v. Perry*, 88 U. S., 205; 22 L. Ed. 577; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S., 282; 22 Sup. Ct. 681, 46 L. Ed. 910. We do not need to determine now what rights the plaintiff has under the patent laws, or whether treated solely as an infringement suit the action can be maintained against the defendant (see *Keeler v. Standard Folding Bed Co.*, 157 U. S., 659; 15 Sup. Ct., 738, 39 L. Ed. 848), for as already shown, **whatever rights the plaintiff has arise under the patent laws, unless there is some contract relation between the plaintiff and the defendant or his vendor.** This depends on the effect of the purchase by the plaintiff's vendor of the assets of the North American Phonograph Company. If that resulted in a [p. 372] novation, so as to impose upon the purchaser the obligations of the insolvent under the contract with the plaintiff, there is a contract relation between the purchaser and the plaintiff. If it be the law that the purchaser at a receiver's sale of the assets of an insolvent corporation assumes its obligations even under executory contracts, no responsible person could safely bid at such a sale; but, as already shown, that is not the law. The contracts in question were sold with the other assets. **The pur-**

chasers assumed no liability except to pay the purchase price, for the decree under which the sale was had imposed no other liability. The assignee of the bid, the National Phonograph Company, was in the same situation, and likewise its assignee, the said Ott. The purchaser bought rights, not liabilities; of course he could not avail himself of rights without discharging reciprocal obligations, but he was not obliged to avail himself of such rights. He could have discontinued the use of the patents purchased without subjecting himself to liability to any one for breach or contract. Of course, he took title to the patents subject to the rights of licensees, but as to him those rights were property, not contract, rights. They resulted from a contract, to be sure, but they arose under the patent laws of the United States. Section 4898 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3387) provides :

“Assignments of Patents. Every patent or any interest therein shall be assignable in law by an instrument in writing, and the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States.”

The licensee has by assignment certain of the rights granted to the patentee by the government, as under the law the rights of the patentee may be subdivided and granted to different grantees. A suit is none the less an infringement suit because it does not involve the validity of a patent. Such a suit may be brought by a licensee against the patentee. *Littlefield v. Perry, supra*; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co., supra*. In it, rights arising under the patent laws are asserted, and the construction of said laws as well as the construction, if not the

validity, of the patent is involved. Such were the rights which the plaintiff's vendor had to respect. **"The assignee of a patent does not in the absence of express contract, assume any obligation to perform the contract of his assignor with the licensee."** *Bradford Belting Co. v. Kisinger-Ison Co.*, 113 Fed., 811, 51 C. C. A. 483. As to the contracts which were assigned to said Ott by the receiver pursuant to the transfer to him of the interest of the National Phonograph Company therein under Mr. Edison's bid, no different question is presented. **Either Mr. Edison, his assignee, the said National Phonograph Company, or its assignee Ott, could have taken an assignment of those contracts without assuming any obligation under them. There are many decisions to the effect, and none that my research has disclosed to the contrary, that, in the absence of express agreement, the assignee of a personal contract is not liable to the covenants of his assignor.** *Adams v. Wadhams*, 40 Barb., 225; *Heinze v. Buckingham*, 42 N. Y. St. Rep., 427, 17 N. Y. Supp., 12; *Suydam v. Dunton*, 84 [p. 373] Hun, 506, 32 N. Y. Supp., 333; *Comstock v. Hitt*, 37 Ill., 543; *Smith v. Kellogg*, 46 Vt., 560. In other words, a man who buys a bargain is not obliged to take the benefit of it. **The suit by the other party for a breach must be brought against the assignor, the contracting party, not against the assignee, unless he agrees to be bound.** Much has been said about the transfer to said Ott, an alleged dummy, but the motives of that transaction are immaterial. By transferring a right the National Phonograph Company assumed no obligation which the retention of the right would not have imposed. So far as the contracts were executory, said Ott got the right to do nothing with them, or to assume the obligations of the insolvent company, as the contracts were in terms assignable on condition that the assignee assume said

obligations. Now, Ott saw fit to assume those obligations, but he did that on his own account, and not on behalf of the National Phonograph Company, as there is not a scintilla of proof in the record warranting the conclusion that the National Phonograph Company was in any way bound by Ott's said agreement. We are not concerned in this suit with the contract relations that may exist between the plaintiff and said Ott. **The conclusion seems inevitable that whatever rights the plaintiff has as against the defendant or his vendor are patent, not contract, rights. If so, any suit to enforce those rights arises under the patent laws of the United States, and the courts of this state cannot take jurisdiction of it.**

Interlocutory judgment reversed and new trial granted, costs to abide the final award of costs. All concur. (Black type ours.)

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Patent of

J. W. AYLSWORTH & W. H. MILLER,

No. 683,676,

October 1, 1901.

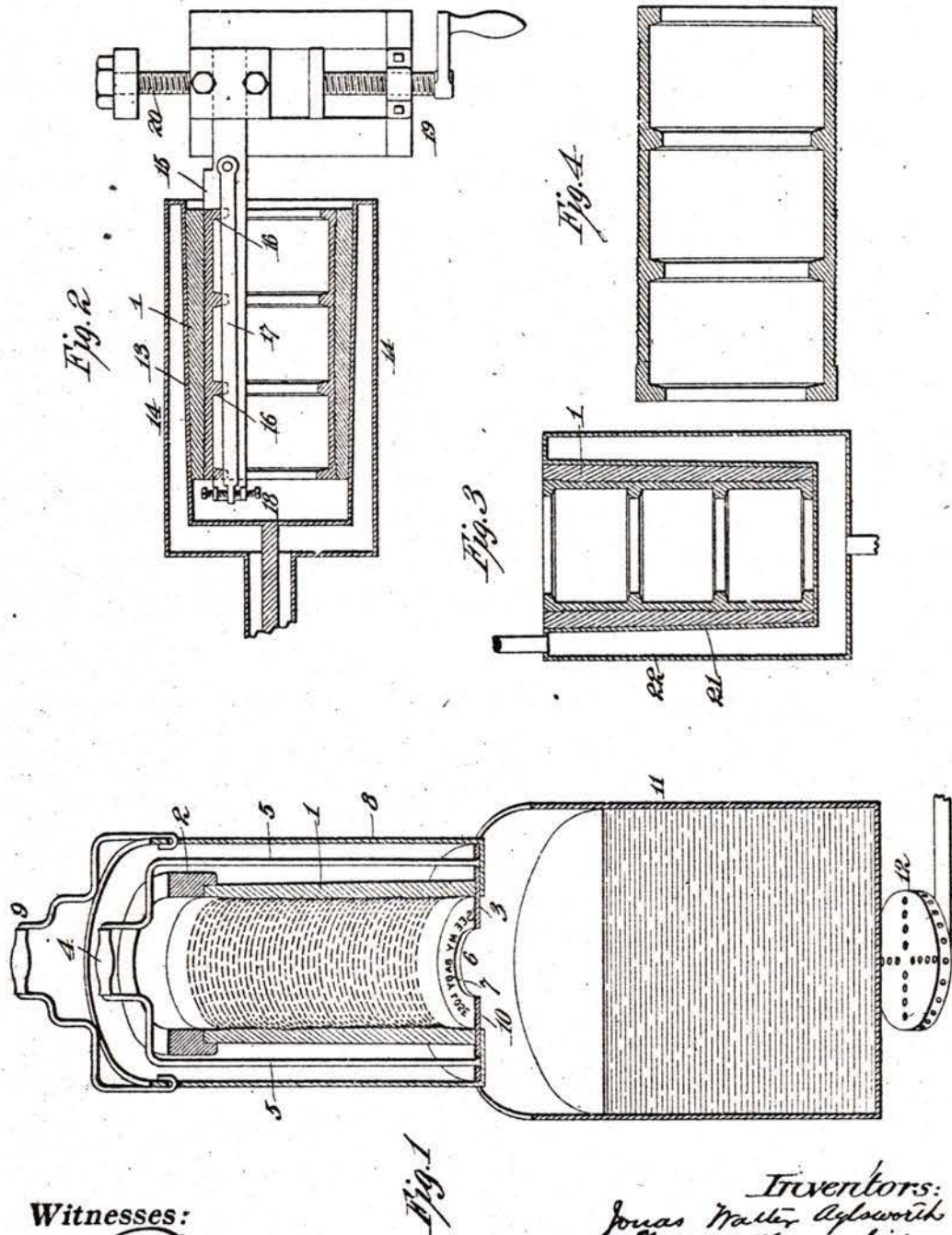
No. 683,676.

Patented Oct. 1, 1901.

J. W. AYLSWORTH & W. H. MILLER.
APPARATUS FOR DUPLICATING PHONOGRAPHIC RECORDS.

(Application filed July 31, 1900.)

(No Model.)



Witnesses:

Geo. Coleman
Geo. R. Taylor

Inventors:
Jonas Walter Aylsworth
Walter Henry Miller

By *Spencer Edmunds & Sons*
Att'ys.

UNITED STATES PATENT OFFICE.

JONAS WALTER AYLSWORTH, OF EAST ORANGE, AND WALTER HENRY MILLER, OF ORANGE, NEW JERSEY, ASSIGNORS TO NATIONAL PHONOGRAPH COMPANY, OF ORANGE, NEW JERSEY.

APPARATUS FOR DUPLICATING PHONOGRAPHIC RECORDS.

SPECIFICATION forming part of Letters Patent No. 683,676, dated October 1, 1901.

Application filed July 31, 1900. Serial No. 25,392. (No model.)

To all whom it may concern:

Be it known that we, JONAS WALTER AYLSWORTH, residing at East Orange, and WALTER HENRY MILLER, residing at Orange, in the county of Essex and State of New Jersey, citizens of the United States, have invented a certain new and useful Apparatus for Duplicating Phonographic Records, of which the following is a specification.

10 Our invention relates to an improved apparatus for duplicating phonographic records. In an application for Letters Patent filed on even date herewith, and numbered serially 25,391, we describe an improved process or method for duplicating phonographic records, which consists in immersing in a bath of molten wax-like coagulable material a matrix or mold which carries on its bore the representation in negative or relief of the record to be duplicated, whereby the molten material will fill the bore of the matrix or mold, but will be excluded from its exterior, the reduced temperature of the matrix or mold relative to the molten material causing the latter to coagulate or chill upon the bore of the matrix until a layer of the desired thickness has been secured, after which the matrix or mold is removed from the bath of molten material and the bore of the duplicate finished by a reaming-tool, the resulting duplicate being finally removed from the matrix or mold by shrinking.

The object of our present invention is to provide an improved apparatus by which the process in question may be expeditiously carried out.

In order that our invention may be better understood, attention is directed to the accompanying drawings, forming a part of this specification, and in which—

Figure 1 is a sectional view of the apparatus and mold in which the deposit or coating of the wax-like material is secured; Fig. 2, a corresponding view of the apparatus for properly reaming the interior of the duplicates; Fig. 3, a similar view of the apparatus employed for the shrinking of the duplicates from the matrix or mold, and Fig. 4 an enlarged corresponding view of one of the resulting duplicates.

In all of the above views corresponding parts are represented by the same numerals of reference.

1 represents a matrix or mold carrying on its bore the representation of the record which is to be duplicated, said representation being obviously in negative or relief. This matrix or mold is made by any approved process and is not a part of our invention.

2 is a metal cap, which is removably fitted upon the upper end of the matrix or mold, with its bore corresponding in diameter with the bore of the matrix or mold.

3 is a metal disk provided with a handle 4, connected to side bars 5 5 and by which the disk may be manipulated. The matrix or mold 1 is carried by the disk 3, as shown. An opening 6 in the disk 3 is of considerably less diameter than the bore of the matrix or mold, and around said opening 6 and within the bore of the matrix or mold the disk may be formed in negative with a representation 7 of suitable words or characters to indicate the subject-matter of the duplicated record, its source of origin, &c.

8 is a sheet-metal receptacle provided with a handle 9 and which carries the disk 3 and the matrix or mold 1, as shown. The receptacle 8 is provided with an opening 10 therein, which may be of the same or of larger size than the opening 6 in the disk 3.

11 represents a tank, which contains, as indicated, a proper supply of suitable wax-like material from which the duplicates are to be made, and which material may be the ordinary commercial phonographic compositions now in use. The material in the tank 11 may be kept in a molten condition by heat applied in any suitable way, as by means of a gas-burner 12.

In carrying out our process with the apparatus so far described we place the matrix or mold on the disk 3 and insert the latter, carrying the matrix or mold in the receptacle 8, as shown, after which the receptacle 8 is immersed in the molten material within the tank 11, which is permitted to enter the matrix or mold to a point above the upper end of the latter, but below the top of the cap 2, so that the material fills the interior of the matrix or mold, but does not

not overflow the same. The matrix or mold is thus kept immersed in the molten material for the desired time required to secure a deposit of the wax-like material of the required thickness. The reduced temperature of the matrix or mold relative to the temperature of the molten material causes the latter to become coagulated or chilled on the interior of the matrix and to deposit thereon to the thickness desired. This chilling also makes the outer surface of the resulting duplicates much smoother than is the case with duplicates made by a mechanical duplicating process. Owing to the thinness of the walls of the receptacle 8, the metal thereof very quickly attains the temperature of the molten material, so that none of the molten material will accumulate thereon. When the desired deposit of molten material is secured, the receptacle 8 is removed from the bath of molten material and the disk 3, carrying the mold, is removed from said receptacle. Obviously the lower edge of the resulting duplicate will be perfectly true, being formed by the portion of the disk 3 between the opening 6 and the bore of the matrix or mold, and if a representation 7 is formed on that portion of the disk such representation will be cast in the bottom end of the duplicate. The cap 2 is now removed from the matrix or mold and the upper end of the duplicate is trimmed off flush with the upper surface of the matrix or mold by any desired form of cutting-tool. The matrix or mold, which has a slightly-tapered outer surface, is now placed in a tapered chuck 13, as shown in Fig. 2, which chuck is provided with a water-jacket 14, through which cold water may circulate in order that the matrix or mold may be kept cold enough to maintain the resulting duplicate, or at least the outer surface thereof, in a chilled and hardened condition. The chuck 13 being rotated in any suitable way, a reaming-tool 15 is introduced within the same, and by reason of the cut-away portions 16 in said reaming-tool a series of ribs will be formed on the duplicate, as shown in Fig. 4, by which the latter will be properly held upon the mandrel of the reproducing-phonograph in the usual way. The reaming-tool 15 carries on one face an auxiliary cutting-blade 17, as shown, pivoted at one end and adjustable at the other by means of adjusting-screws 18. By changing the inclination of this cutting-blade 17 the depth and taper of the ribs can be regulated with the utmost certainty, so that the record can be accurately fitted to the tapered mandrel of the reproducing instrument. In other words, the ribs which are formed by the cut-away portion 16 of the reaming-tool will by the auxiliary blade 17 be cut to gradually-increasing diameters from one end of the duplicate to the other, so that the duplicate will be frictionally received upon the usual tapered mandrel. The reaming-tool 15 is carried by the usual slide-head of the lathe, and the depth of cut of said

tool is limited by a regulating-screw 20, as shown. After the interior of the duplicate has been properly reamed, as explained, the matrix or mold is removed from the chuck 13 and inserted in a cooling-mold 21, having a water-jacket 22, and through which cold water may circulate, the matrix or mold being kept in the cooling-mold until the resulting duplicate has contracted sufficiently to enable it to be removed from the matrix or mold, whereupon the operation will be completed. By reaming the interior of the resulting duplicates, as explained, to form a series of ribs therein the duplicates may be made much thinner than the ordinary original records, and hence more economically, it being of course understood that the material removed by the reaming-tool will be used for the manufacture of subsequent duplicates.

Having now described our invention, what we claim as new, and desire to secure by Letters Patent, is as follows:

1. An improved apparatus for duplicating phonographic records, comprising a receptacle carrying a matrix or mold, the latter having the record in relief on its bore, and an opening in said receptacle concentric with the bore of the matrix or mold, whereby the receptacle with the matrix or mold may be immersed in a bath of molten, wax-like material to fill the bore of the matrix or mold but to be excluded from its exterior, substantially as set forth.

2. An improved apparatus for duplicating phonographic records, comprising a receptacle having an opening in its bottom, a disk carried by the receptacle and having a corresponding opening, and a matrix or mold seated upon said disk with its bore concentric with the opening therein, whereby the receptacle with the matrix or mold may be immersed in a bath of molten, wax-like material to fill the bore of the matrix or mold but to be excluded from its exterior, substantially as set forth.

3. An improved apparatus for duplicating phonographic records, comprising a receptacle having an opening in its bottom, a disk carried by the receptacle and having a corresponding opening, and a matrix or mold seated upon said disk with its bore concentric with the opening therein, whereby the receptacle with the matrix or mold may be immersed in a bath of molten, wax-like material to fill the bore of the matrix or mold but to be excluded from its exterior, the disk being provided between the opening therein and the bore of the matrix or mold with a representation to be molded upon the end of the desired duplicates, substantially as set forth.

4. An improved apparatus for duplicating phonographic records, comprising a receptacle having an opening in its bottom, a matrix or mold seated over said opening and carrying on its bore the representation in relief of the record to be duplicated, and a re-

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movable cap carried by the upper end of the matrix or mold, whereby by immersing the receptacle in a bath of molten material the latter may enter the bore of the matrix or mold above the upper end thereof without overflowing to contact with its exterior, substantially as set forth.

5. An improved apparatus for making duplicate phonographic records, comprising a matrix or mold carrying on its bore the representation of the record to be duplicated, a disk upon which said matrix or mold is seated, said disk carrying concentrically within the bore of the matrix or mold a designation of such record, and means for depositing molten material within the matrix or mold and upon said disk, whereby the duplicate record will be formed and its designation be simultaneously cast or impressed upon the end thereof, substantially as and for the purposes set forth.

6. An improved apparatus for duplicating phonographic records, comprising the combination with means for securing a deposit of a wax-like coagulable material upon the bore

of a matrix or mold which carries the representation of the record to be duplicated, of means for finishing the interior of the duplicate while the latter is in position within the matrix or mold, substantially as set forth. 30

7. An improved apparatus for duplicating phonographic records, comprising the combination with means for securing a deposit of a wax-like coagulable material upon the bore of a matrix or mold which carries the representation of the record to be duplicated, of means for forming within the duplicate while the latter is in position in the mold a series of concentric ribs of gradually-increasing diameters from one end of the duplicate to the other, whereby the duplicate may be properly received upon a tapered mandrel, substantially as set forth. 40

This specification signed and witnessed this 17th day of July, 1900.

JONAS WALTER AYLSWORTH.
WALTER HENRY MILLER.

Witnesses:

JOS. EVANS,
ELIZABETH EVANS.

Patent of
T. A. EDISON,
No. 713,209,
November 11, 1902.

No. 713,209.

Patented Nov. 11, 1902.

T. A. EDISON.

PROCESS OF DUPLICATING PHONOGRAMS.

(Application filed Mar. 5, 1898.)

(No Model.)

3 Sheets—Sheet 1.

Fig. 1^e

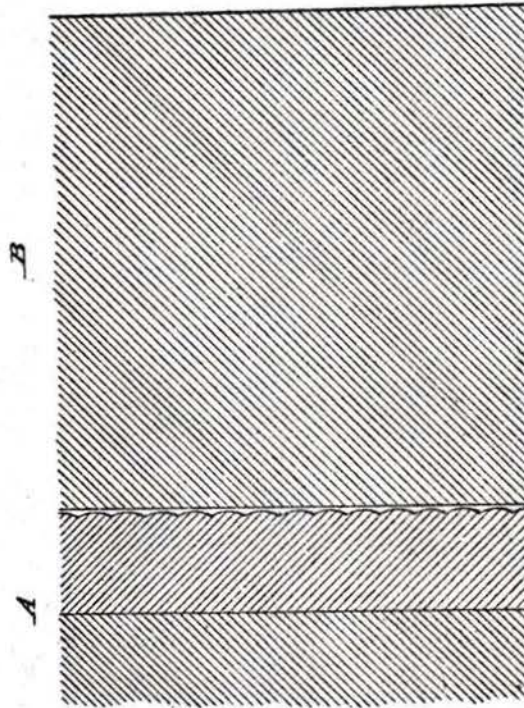
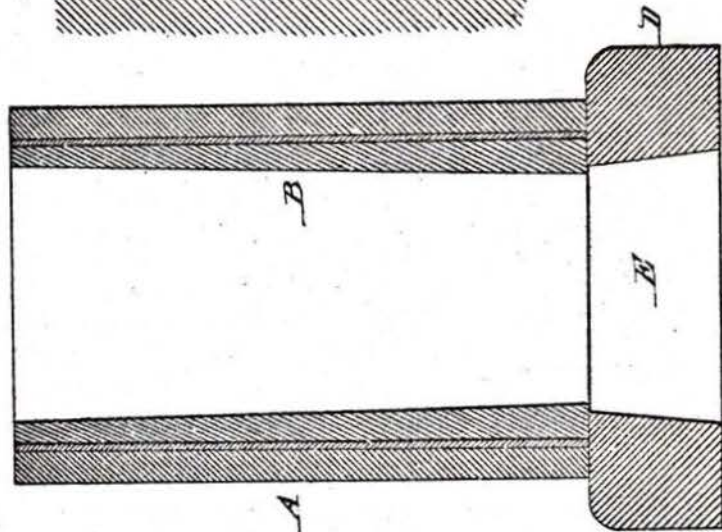


Fig. 1



Witnesses:

Jos. F. Coleman

Geo. Robt Taylor

Inventor

Thomas A. Edison

by Alfred Edmunds

Att'ys.

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Patented Nov. 11, 1902.

T. A. EDISON.

PROCESS OF DUPLICATING PHONOGRAMS

(Application filed Mar. 5, 1898.)

(No Model.)

3 sheets—Sheet 2.

Fig. 2^a

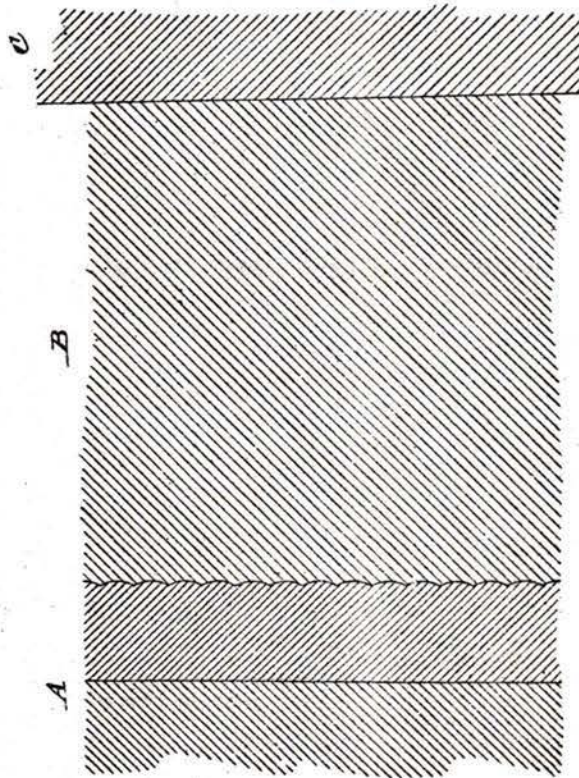
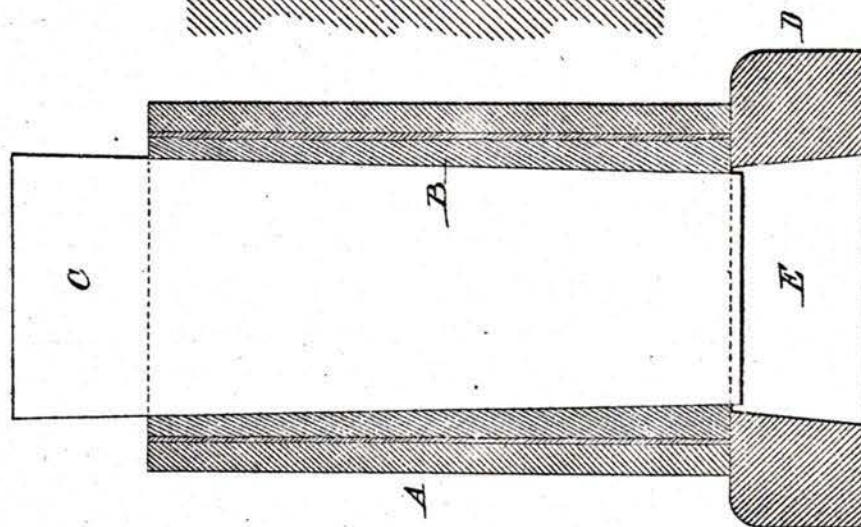


Fig. 2



Witnesses:

Geo. F. Coleman
Geo. Robt Taylor

Inventor

Thomas A. Edison
by Allen Edmund Myers
Att'ys

No. 713,209.

Patented Nov. 11, 1902.

T. A. EDISON.
PROCESS OF DUPLICATING PHONOGRAMS.

(Application filed Mar. 5, 1898.)

(No Model.)

3 Sheets—Sheet 3.

Fig. 3^d

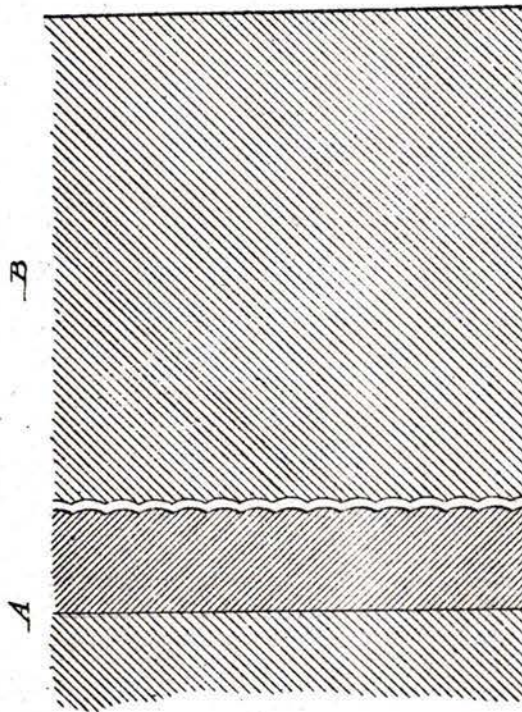
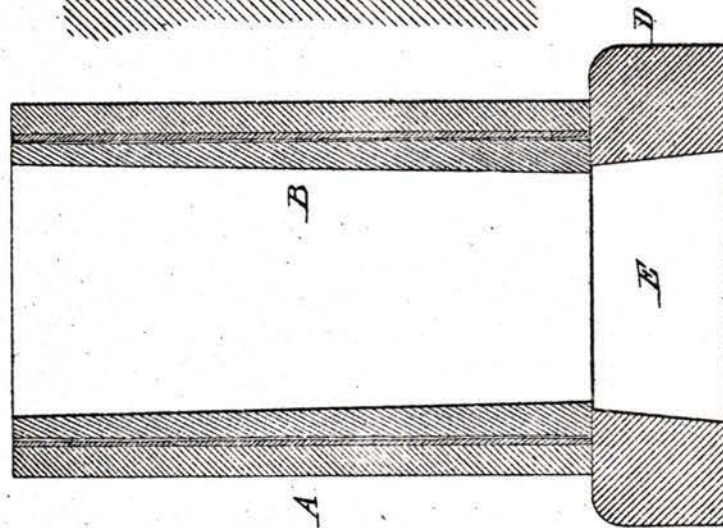


Fig. 3



Witnesses:

Jas. F. Coleman
Geo. Robt Taylor

Inventor

Thomas A. Edison
by Arthur Edwards
Att'ys.

UNITED STATES PATENT OFFICE.

THOMAS A. EDISON, OF LLEWELLYN PARK, NEW JERSEY

PROCESS OF DUPLICATING PHONOGRAMS.

SPECIFICATION forming part of Letters Patent No. 713,209, dated November 11, 1902.

Application filed March 5, 1898. Serial No. 872,850. (No specimens.)

To all whom it may concern:

Be it known that I, THOMAS A. EDISON, a citizen of the United States, residing at Llewellyn Park, in the county of Essex and State of New Jersey, have invented certain new and useful improvements in Processes of Duplicating Phonograms, (Case No. 994,) of which the following is a specification.

The object I have in view is to produce a practical process for the duplication of phonographic records, whereby a practically unlimited number of duplicate phonographic records may be obtained which will be absolutely identical in every respect with the original record. Generally I propose to construct a suitable matrix, preferably in metal, and by its use to impress duplicate phonograms with a phonographic record thereon, such phonograms being preferably constructed of a material having a greater coefficient of expansion than the material of the matrix or mold.

By my process the duplicate phonogram or the surface thereof may be and preferably is constructed of a material too hard for the satisfactory cutting of an original record therein by the usual phonographic recorder, whereby the duplicate phonograms may be made more durable than it is possible to make original records; but the duplicate phonograms may obviously be made of a softer material.

My improved process can be carried out for the reproduction of phonographic records of any desired form, either flat disks or hollow cylinders; but it has been specially devised for use in connection with the duplication of records of the latter type. For the duplication of cylindrical phonographic records from a tubular matrix my improved process also provides for the effective removal of the finished duplicate from the matrix without injury to the record-surface of the former.

In carrying my process into effect I first construct a matrix carrying a negative representation of the record, which matrix can be produced by any of the known processes—as, for example, those indicated in my Patent No. 484,582, dated October 18, 1892. As I explained in this patent, an original phonographic record having a surface of the usual wax-like material is first secured and its sur-

face coated with a coating of conducting material in order to permit the original record to be electroplated. This conducting coating can be and preferably is applied by a process of vacuum deposit, as I described in my Patent No. 527,147, dated September 18, 1894, by placing the record in a vacuum-chamber in which a metal is vaporized by an electric arc produced between electrodes of the metal, the metallic vapor depositing as a thin uniform coating on the original record. I prefer to apply a preliminary coating by a process of vacuum deposit, for the reason that the highly-communited condition of the vaporized metal permits the coating to form as a uniform film, following accurately all the variations of the record, however minute. Instead of coating the original record with a vaporized metal it may be coated with a very thin layer of specially-prepared plumbago of exceedingly-great fineness, or instead thereof gold-leaf or silver salts reduced by chemical reagents to the metallic state may be used for the same purpose. Having thus applied a very thin preliminary coating to the original record, the latter is immersed in an electroplating bath and electroplated with a metal to the desired thickness, thereby forming a shell inclosing the original record, which shell carries on its bore an accurate negative representation of that record. Preferably this shell is suitably incased in a close-fitting cylindrical jacket, although if the electroplating is carried on long enough to form an electroplated coating of sufficient thickness a jacket need not be used. The original record is removed from the electroplated matrix obtained as described either before or after the jacket, if used, is applied to the shell. This removal of the original record can be effected either by dissolving or melting the wax-like material or by contracting the original record radially and removing it by a direct longitudinal movement. In the case of cylindrical phonographic records the resulting matrix will be a hollow metal cylinder or tube or one internally faced with metal carrying the phonographic record in relief upon its inner surface.

While I have indicated convenient and well-known methods for producing the ma-

inventor

Edison

Atty's.

trix, it will be obvious that the matrix can be obtained in any other way familiar to those skilled in the art.

Having obtained a suitable matrix carrying
5 a negative representation of the original phonographic record to be duplicated, I proceed with the duplication of the records as follows: The blanks which are to receive the duplicate records are preferably composed of a material having a higher coefficient of expansion
10 than that of the matrix or mold, and said blanks are made sufficiently thick to maintain their shape during and after the act of disengagement from the matrix, as will be explained. The blank under normal temperatures is of a diameter very slightly less than the bore of the matrix or mold, whereby the blank may be inserted in the same. After the blank has been thus placed within the
20 matrix or mold both the matrix and the blank contained therein are, or the blank alone is, brought to a higher temperature, whereby the blank will expand and will be brought into intimate contact with the record-surface of the matrix or mold, whereby the negative record thereof will be impressed with absolute accuracy upon the surface of the blank. The expansion of the blank into this intimate engagement with the interior of the
25 matrix or mold may be effected in any suitable way, such as by maintaining the matrix or mold, with the blank contained therein, in a heated atmosphere. By making the blank of a material having a higher coefficient of expansion than the matrix or mold the blank will be properly expanded to receive the impression of the record, notwithstanding the fact that both the blank and the matrix or mold may be subjected to the same temperature.
40

In order to facilitate the operation and make the resulting duplicate record somewhat sharper, I prefer to introduce a tapering mandrel within the blank after the blank
45 has been placed in the matrix or mold and heat applied to the blank, as explained, and to force the mandrel tightly within the blank after the latter has been expanded into engagement with the record, whereby the blank
50 will be further expanded mechanically into absolute intimacy with the record, after which the mandrel will be immediately withdrawn. With blanks made of sufficiently viscous material the entire expansion may be effected
55 mechanically by forcing a tapering mandrel within the same.

After the blank has been expanded, so as to receive the impression of the matrix or mold, it is removed by first shrinking it radially in any suitable way, as in a refrigerating-chamber, and by then withdrawing the resulting duplicate record by a direct longitudinal movement. Owing to the shallowness of the phonographic-record groove this radial
60 shrinkage of the duplicate record effects a sufficient separation of the surfaces of the

matrix and of the duplicate record to prevent injury to the surface of the duplicate record due to any longitudinal contraction thereof.

I find that by the process above described, 70 and particularly when a matrix or mold is obtained by a process of vacuous deposit, as explained, duplicate phonographic records can be obtained which will be accurate reproductions of the original records and be free 75 from extraneous noises and wherein the quality and intensity of the original vibrations will be reproduced with absolute faithfulness. I find, moreover, that since by this process there is little or no wear upon the matrix or 80 mold a practically unlimited number of duplicates may be obtained from a single matrix or mold.

The degree of heat necessary to properly expand the blank will depend largely upon 85 the material of which the blank is formed and upon the closeness of fit of the blank when inserted within the matrix or mold. For the same reasons the extent of the reduction of temperature in chilling and shrinking 90 the duplicate record will vary to a considerable extent.

The invention is illustrated in the accompanying drawings for convenience in connection with a cylindrical phonogram. 95

In the drawings, Figure 1 is a sectional view showing a matrix or mold with a blank introduced therein prior to the expansion of the blank into engagement with the record-surface of the matrix; Fig. 1^a, a section 100 through a part of the walls of the blank and matrix very greatly enlarged; Fig. 2, a view similar to Fig. 1, showing the blank expanded into engagement with the matrix and illustrating also a tapered mandrel forced into 105 the blank; Fig. 2^a, a view corresponding to Fig. 1^a, showing a part of the walls of the matrix, blank, and mandrel of Fig. 2, very greatly enlarged; Fig. 3, a view corresponding to Figs. 1 and 2 with the tapered mandrel 110 removed and illustrating the formed duplicate as having been contracted radially preparatory to being removed from the blank by a direct longitudinal movement; and Fig. 3^a, a section, very greatly enlarged, corresponding to Figs. 1^a and 2^a and illustrating the relative relation between the duplicate and matrix prior to the removal of the former. 115

In the views corresponding parts are represented by the same letters of reference. 120

A represents the matrix or mold, carrying on its bore a negative representation of the record to be reproduced.

B represents the blank to be duplicated, which is preferably provided with a tapered 125 bore, as is now common, and which is of sufficient thickness to maintain its shape during and after the act of disengagement from the matrix. This blank is turned down so that it may be inserted within the matrix or mold with 130 a close fit, as shown in Figs. 1 and 1^a. The blank to be duplicated may be and prefer-

ably is of a harder material than can be practically or satisfactorily engraved, indented, or cut by a phonographic recorder, whereby the duplicate phonographic records will be more durable than could be obtained in the first instance by the operation of a recording or indenting device actuated directly by the sound-waves. These blanks may therefore be made of a relatively hard material, such as asphalt, or of stearic acid or stearate of soda mixed with varying proportions of fine precipitates—such as chalk, slaked lime, or lamp-black—or waxes or resins may be used, such as sealing-wax or shellac mixed with fine precipitates, like chalk, or polished ebonite, vulcanized hard rubber, or celluloid may be used, or glue may be employed either alone or mixed with precipitates, such as chalk.

C, Figs. 2 and 2^a, represents a tapered mandrel, which may be inserted within the blank B.

D represents a support for the matrix or mold and for the blank within the same, said support having an opening E therein, whereby the mandrel C may be moved longitudinally within the blank.

In carrying out the process I first introduce the blank within the matrix with as close a fit as practical, as shown in Figs. 1 and 1^a, after which the mandrel C is inserted within the blank. These parts are then subjected to heat, such as by being maintained in a heated atmosphere, whereby the blank will, by reason of its greater coefficient of expansion than the matrix or mold, be expanded into intimate contact with the record-surface of the latter, and an impression of such record will be accurately received on the blank. When the blank has been thus expanded into engagement with the matrix or mold, the mandrel C is forced tightly within the blank, so as to further expand it mechanically, whereby the blank will be forced into absolute intimacy with the record, and an impression will be received on the blank which will be clear, sharp, and an absolutely faithful reproduction of the original record. After the mandrel has been forced within the blank it is immediately withdrawn, and the blank is then chilled in any suitable way, such as by placing the matrix, with the blank contained therein, in a refrigerating-chamber. In this way the blank or duplicate will shrink or contract radially, as shown in Figs. 3 and 3^a, sufficiently to be removed from the matrix or mold by a direct longitudinal movement. Owing to the extreme shallowness of the phonographic-record groove, a sufficient radial separation between the resulting duplicate and the matrix or mold will take place to prevent any longitudinal contraction of the duplicate from injuring the record-surface thereof.

Having now described my invention, what I claim as new, and desire to secure by Letters Patent, is as follows:

1. The process of duplicating sound-records

that consists in impressing a plastic record-tablet against a suitable matrix by its own expansive force.

2. The method of producing hollow cylindrical phonograms, which consists in obtaining a mold having a reverse phonogram-record on the inner wall of a cylindrical opening, forming a hollow cylindrical plastic phonogram within said mold, releasing the phonogram from the mold by a radial contraction of the phonogram sufficient to entirely clear the surfaces, and removing the phonogram from the mold by direct longitudinal movement.

3. The method of producing hollow cylindrical phonograms which consists in obtaining a mold having a reverse phonogram-record on the inner wall of a cylindrical opening, forming a hollow cylindrical plastic phonogram within said mold, releasing the phonogram from the mold by a reduction in temperature sufficient to entirely clear the surfaces, and removing the phonogram from the mold by direct longitudinal movement.

4. The method of producing phonograph-cylinders which consists in placing within a hollow cylindrical record mold or matrix, a hollow cylindrical phonograph-blank of sufficient thickness to maintain its shape during and after its engagement with the matrix, outwardly expanding such blank against said matrix, disengaging the impressed record-cylinder from the matrix, and withdrawing said record-cylinder from the matrix by direct longitudinal movement.

5. The method of producing phonograms which consists in placing within a hollow cylindrical record-matrix a hollow cylindrical phonograph-blank of sufficient thickness to maintain its form under normal conditions, softening said blank by heat and expanding the same while heated so as to take the record from the matrix, shrinking the phonogram so made by change of temperature, and withdrawing the same from the matrix by direct longitudinal movement.

6. The method of producing phonograms which consists in placing within a hollow matrix a hollow body of plastic material, said body being a cylinder on its outer surface and having a tapering central longitudinal aperture, softening said body by heat and expanding it into the matrix by the longitudinal movement of a tapering plunger within the plastic body, shrinking the plastic material and withdrawing it from the matrix by direct longitudinal movement.

7. The process of duplicating phonograms having a phonographic record thereon, which consists in forming a matrix or mold wherein the original record will be reproduced in relief, in loosely engaging a blank phonogram with said matrix, and in finally intimately engaging the blank phonogram with said matrix or mold by changes in temperature, substantially as set forth.

8. The process of duplicating phonograms having a phonographic record thereon, which consists in depositing a metal on said phonogram to form a matrix or mold wherein the original record will be reproduced in relief, and in intimately engaging a blank phonogram with the said matrix or mold by a change in temperature, substantially as set forth.

9. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal on said phonogram to form a matrix or mold wherein the original record will be reproduced in relief, in inserting the continuous cylindrical blank to be reproduced within said matrix or mold, in expanding the blank into intimate engagement with the record in relief carried by the bore of said matrix or mold, the cylindrical blank being sufficiently thick to maintain its shape during and after the act of disengagement from the matrix, and finally removing the cylinder by direct longitudinal movement, substantially as set forth.

10. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal upon the original phonogram so as to form a matrix or mold, in inserting the blank to be reproduced within said matrix or mold, in expanding the blank into intimate engagement with the record in relief carried by the bore of said matrix or mold, in finally shrinking the blank to disengage it from the matrix or mold, the cylindrical blank being made sufficiently thick to maintain its shape during and after the act of disengagement from the matrix, and finally removing the cylinder by direct longitudinal movement, substantially as set forth.

11. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal on said phonogram to form a matrix or mold wherein the original record will be reproduced in relief, in inserting the blank to be reproduced within said matrix or mold, in heating the blank, whereby the same will be expanded into engagement with the record in relief carried by the bore of said matrix or mold, and in finally subjecting the expanded blank to pressure to more intimately engage it with said record, substantially as set forth.

12. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal on said phonogram to form a matrix or mold wherein the original record will be reproduced in relief, in inserting the blank to be reproduced within said matrix or mold, in heating the blank, whereby the same will be expanded into engagement with the record in relief carried by the bore of said matrix or mold, in subjecting the expanded blank to pressure to more intimately engage it with such record, and in finally chilling the blank to re-

move it from the matrix or mold, substantially as set forth.

13. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal upon the original phonogram to form a matrix or mold, in covering said matrix or mold with a metal backing, in introducing the continuous cylindrical phonogram to be reproduced within said matrix or mold, in expanding said phonogram into intimate engagement with the record in relief carried by the bore of said matrix or mold, the cylindrical blank being made sufficiently thick to maintain its shape during and after the act of disengagement from the matrix, and finally removing the cylinder by direct longitudinal movement, substantially as set forth.

14. The method of producing phonograms, which consists in securing a hollow metallic mold or shell containing the reverse record, placing in said mold an expansible blank sufficiently thick to maintain its shape during and after its removal from the mold, expanding both by heat, impressing the record in the blank, contracting the phonogram so made by the withdrawal of heat, and removing the phonogram from the mold by a direct longitudinal movement, substantially as set forth.

15. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing a metal upon the original phonogram so as to form a matrix or mold, in inserting within said matrix or mold a blank to be reproduced made of a material having a higher coefficient of expansion than said matrix or mold, and in heating the blank and matrix carried thereby, whereby the blank will be expanded into intimate engagement with the record in relief carried by the bore of said matrix or mold, substantially as set forth.

16. The process of duplicating cylindrical phonograms having a phonographic record thereon, which consists in depositing in a vacuum a metal vapor upon the original phonogram, electroplating a metal thereon so as to form a matrix or mold, in inserting the continuous cylindrical blank to be reproduced within said matrix or mold, in expanding the blank into intimate engagement with the record in relief carried by the bore of said matrix or mold, the cylindrical blank being made sufficiently thick to maintain its shape during and after the act of disengagement from the matrix, and finally removing the cylinder by direct longitudinal movement, substantially as set forth.

17. The method of producing record-cylinders for phonographs, which consists in first forming a record on a cylinder of wax or other relatively soft material, rendering the surface of the wax cylinder electrically conductive, and electrolytically depositing metal thereon forming a matrix, and then outwardly

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expanding under pressure within the matrix
a cylinder or tube of softened material suffi-
ciently thick to maintain its shape during
and after the act of disengagement from the
matrix, and finally removing the cylinder or
tube by direct longitudinal movement.

18. The herein-described process of mold-
ing sound-records in celluloid, which consists
of softening a celluloid tablet and then forc-

ing the same against a suitable matrix by its
own expansive force, substantially as de-
scribed.

This specification signed and witnessed this
21st day of February, 1898.

THOMAS A. EDISON.

Witnesses:

J. F. RANDOLPH,
RICH. N. DYER.